UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO (TOLEDO)

Case No. 11-00047-CIV-DAK

FEDERAL TRADE COMMISSION,)
AND THE STATE OF OHIO,)
)
PLAINTIFFS,)
)
-v-)
)
PROMEDICA HEALTH SYSTEM, INC.,)
)
DEFENDANT.) West Palm Beach, Florida
) February 10, 2011
_____)

VOLUME 1, PAGES 1 - 267

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS

BEFORE THE HONORABLE DAVID A. KATZ

SENIOR UNITED STATES DISTRICT JUDGE

Appearances:

FOR PLAINTIFF FTC
Matthew J. Reilly, ESQ.
U.S. Federal Trade Commission
601 New Jersey Avenue, Northwest
Washington, DC 20580

Jeffrey H. Perry, ESQ.
U.S. Federal Trade Commission
600 Pennsylvania Avenue, Northwest
Washington, DC 20580

Reporter
(561)514-3768
Stephen W. Franklin, RMR, CRR, CPE
Official Court Reporter
701 Clematis Street, Suite 417
West Palm Beach, Florida 33401

(APPEARANCES CONTINUED ON PAGE 2.)

Appearances (Continued):

FOR PLAINTIFF FTC	Sara Y. Razi, ESQ. U.S. Federal Trade Commission 601 New Jersey Avenue, Northwest Washington, DC 20580
	Janelle Filson, ESQ. U.S. Federal Trade Commission 601 New Jersey Avenue, Northwest Washington, DC 20580
FOR PLAINTIFF STATE OF OHIO	Beth A. Finnerty, ESQ. Office of the Attorney General Antitrust Section 23rd Floor 150 East Gay Street Columbus, OH 43215
FOR THE DEFENDANT	David Marx, Jr., ESQ. McDermott, Will & Emery, LLP Suite 4400 227 West Monroe Street Chicago, IL 60606
	Amy E. Hancock, ESQ. McDermott, Will & Emery, LLP 600 Thirteenth Street, N.W. Washington, DC 20005
	Amy J. Carletti, ESQ. McDermott, Will & Emery, LLP 227 West Monroe Street Chicago, IL 60606
	Stephen Y. Wu, ESQ. McDermott, Will & Emery, LLP 227 West Monroe Street Chicago, IL 60606

(Call to the order of the Court.)

THE COURT: Please be seated, ladies and gentlemen.

I think I can almost see you from here. Give me one moment, please.

Again, good morning, ladies and gentlemen.

VOICES: Good morning, Your Honor.

THE COURT: As you may know, the parties have agreed that this preliminary injunction hearing will today be divided as to time between the Plaintiff, FTC, and the Defendants ProMedica three hours and three hours. And we'll try, as will counsel, to stick with that. If we run over somewhat, I will understand it because of the various restrictions imposed upon us by this setup in this courtroom.

Tomorrow we will continue at 9:00 a.m., and I would assume we will be done somewhere between 12:00 and 1:00 tomorrow.

Is that an accurate reflection of the time agreements that the parties have made?

MR. REILLY: Yes, Your Honor.

THE COURT: Thank you.

I'd like now to have counsel make their appearances for the record.

MR. REILLY: Good morning, Your Honor. Matt Reilly for the Federal Trade Commission, with Jeff Perry, Sara Razi and Janelle Filson, and for the State of Ohio, Beth Finnerity,

F-i-n-n-e-r-i-t-y.

THE COURT: Thank you.

Mr. Marx.

MR. MARX: Your Honor, David Marx from McDermott, Will and Emery, accompanied by Amy Hancock, Amy Carletti and Steven Wu, on behalf of ProMedica Health System.

THE COURT: Thank you.

Mr. Reilly.

Oh, before we get started . . .

(Discussion held off the record.)

MR. REILLY: Good morning, Your Honor.

THE COURT: Good morning.

MR. REILLY: As you know, this matter has co-plaintiffs, the FTC, Federal Trade Commission, and the State of Ohio Attorney General. I think I'll be presenting on behalf of the co-plaintiffs today unless Ms. Finnerity comes up and tackles me because I'm doing a terrible job. So absent that, I think you'll be hearing from me this morning.

Just going to do a quick overview before I get into some of the facts and evidence.

We're here today, Your Honor, because the dominant health system, ProMedica, is acquiring a fierce close competitor and already has, in fact, acquired a fierce close competitor.

This acquisition is unlawful in two separate relevant

markets and is presumed unlawful in a very strong manner, not by a short margin but by a very wide margin.

The Plaintiffs have presented this Court with hundreds of exhibits that already strengthen the strong presumption. The evidence that we have presented to this Court does not rely on the presumption, it strengthens an already strong presumption, and we'll talk a lot this morning about what the presumption means.

And this strong presumption cannot be rebutted by Defendant, especially in this 13B proceeding. We don't think they will be able to rebut the presumptions in the merits trial, but for this 13B proceeding, the challenge is overwhelming.

And the proposed relief that we're asking for is necessary to prevent consumer harm and maintain St. Luke's viability during the merits trial. And we'll talk more about the relief either later this morning or tomorrow.

Of course, Your Honor, both sides haven't put forth four-and-a-half hours of arguments because we agree on everything. We of course disagree on a lot, and that's why we're in this courtroom rather than somewhere else, on the golf course. But it's pretty astounding how much we do agree on, and throughout this presentation, I will make sure I point out to you to the best of my understanding where we agree with the Defendant and where we disagree, so you'll have a better

understanding of what facts are in dispute.

Since we last met with you, Your Honor, there's been a lot going on in the part three merits trial. Since the TRO hearing, the initial scheduling conference took place on February 5th, both parties presented about an hour of argument and an overview, and the scheduling order has been entered. There's a full discovery plan in place. Initial disclosures have been exchanged, preliminary witnesses lists due on February 16th, and interrogatories, requests for admissions.

As you mentioned at the TRO hearing, and this hasn't changed, nor will it, the trial on the merits will begin on May 31st, 2011, and that trial on the merits will have up to 210 hours of live testimony, and we expect the administrative law judge, Judge Chappell, to issue an opinion by the end of this year.

So why are we here? We're here for a very simple reason, Your Honor, it's to maintain the status quo while the Commission does its Congressionally-mandated job of analyzing this transaction, having the merits trial there.

Maintaining the status quo means preventing phenomenal rate increases during the merits trial, prevent job reductions and service line cuts at St. Luke's, all of which have been planned, and preserve the commission's ability to obtain full and effective relief after the merits trial. That is the purpose of the 13B. Rather than letting parties

consummate, the 13B has been designed to make sure, if warranted, the Commission is able to get full and effective relief after they decide this in the first instance and later, to -- directly to an appeal, to the Court of Appeals directly.

Those are the same three goals under the voluntary hold separate agreement that was in place and still is in place, and these are the exact same objectives that we will ask for this Court to enter into an order.

So why are we here? Your Honor, as you understand by now, this is not the merits trial. The only purpose of proceeding under Section 13(b) is to preserve the status quo until the FTC can perform its function. And that comes from the Fourth Circuit Food Town.

So this Court is clear, this is not the merits trial, but what we're asking you to enter into here is very important. It's very important to make sure that interim harm through dramatic price increases don't occur. It's important to make sure St. Luke's continues the exact same service lines and same staffing levels that has allowed it to get very high patient satisfaction levels.

The District Court is not authorized to determine whether the antitrust laws have been or are about to be violated. Adjudicatory function is vested in the FTC in the first instance. That comes from the D.C. Circuit.

So that's why we're here, Your Honor, asking you to

please maintain the status quo of the merits trial which is already underway, which is fast-moving, comes to its conclusion.

So the preliminary injunction standard under 13(b) is a public interest standard. This Court should rule for us if it believes such action would be in the public interest. And that public interest has two separate elements: Likelihood of success on the merits and weighing of the equities.

It's been very clear in the court law that the FTC should be entitled to injunctive relief more broadly available to the FTC than private parties. The CCC Holdings is the last 13(b) case opinion decided by a court.

And the FTC, an expert agency acting on the public's behalf, should be able to obtain injunctive relief more readily than private parties.

The standard for a preliminary injunction under 13(b) is significantly lower than the traditional preliminary injunction standard, and I don't think there's any dispute about that.

So what does likelihood of success on the merits mean? It means -- and again, this is clear in every circuit that's decided this, including the Sixth Circuit, that the FTC need only to raise serious and substantial questions. And this comes from FTC Butterworth, Sixth Circuit in 1997. "The FTC meets its burden if the FTC has raised questions going to

the merits so serious, substantial, difficult and doubtful as to make them fair grounds for thorough investigation, study, deliberation and determination by the FTC in the first instance, and ultimately, by the Court of Appeals."

The precedents irrefutably teach that in this context, the likelihood of success on the merits has a less substantial meaning than in other preliminary injunction cases. That comes again, Your Honor, from the last 13(b) opinion issued by any court in the country.

So the Defendant in their papers have repeated that we have a burden of likelihood of success on the merits, and they're correct. But what they don't say, and there's very little dispute and no dispute by every circuit, including the Sixth Circuit, that we meet our burden if we raise serious and substantial questions. That's all we have to do in the 13(b) proceeding agreed on by every court; and we have met our likelihood of success on the merits standard.

At the merits trial, we will be required to show that this acquisition violates the Clayton Act, and so I thought it would be important to give a brief overview what the Clayton Act says. The Clayton Act requires only a showing that the transaction may be -- that the effects of the transaction may be to substantially lessen competition. Not will, not will definitely; may be substantially to lessen competition.

In a very famous Supreme Court case, Brown Shoe,

famous in our little antitrust world, Congress used the words "may be "to indicate that its concern was with probabilities, not with certainties.

In another well-known Supreme Court case, Philadelphia National Bank, the fundamental purpose of amending Section 7 was to arrest the trend towards concentration, the tendency to monopoly, before the consumer's alternatives disappear through the merger. And that's what's known as the incipiency standard, Your Honor. The Clayton Act allows the FTC to act without showing certainty if there may be substantially less in competition because rather than waiting and seeing what the actual effects of an acquisition are and see what harm occurs, that is not in the public interest.

And, again, the last 13(b) case decided in the country: "To establish a violation of Section 7, the FTC need not show that the challenged merger will lessen competition, but only that the loss of competition is a sufficiently probable and imminent result of the merger acquisition."

So that is the standard when it comes to likelihood of success, Your Honor. If we raise serious substantial questions that warrant further investigation, we have met our likelihood of success on the merits prong of 13(b).

The second element under 13(b) is weighing the equities. Those are the two. It's pretty simple, at least in

the words.

And the FTC almost -- always chose the equities because the public equities are more important than private equities, and the most important public equity is effective enforcement of the antitrust laws. That was the specific intent of Congress when enacting 13(b), again from CCC Holdings. Private equities are not proper considerations for granting or withholding injunctive relief under 13(b). Instead, public equities are paramount.

And to put this in more context, Your Honor, no court in the country has ever decided against the FTC in a 13(b) case after they met their likelihood of success on the merits requirement after they raised serious substantial questions because a paramount public equity is effective enforcement of the antitrust laws, the FTC has never been denied relief in a 13(b) case where it's met its burden on that prong.

We're also going to be talking a lot this morning about the presumption of harm, and we believe that at least for one of the markets, the large market, the presumption of harm is undisputed here. And the Courts place substantial weight on the presumption of anticompetitive effects.

And this comes again from Philadelphia National Bank. "A merger that causes undue market share and significantly increases concentration is so inherently likely to lessen competition substantially, that it must be enjoined in the

absence of evidence clearly showing that a merger is not likely to have such anticompetitive effects." That's the strength of presumption, presumption of illegality once the FTC shows undue market share and concentration.

And this is from Whole Foods in the D.C. Circuit. "Once undue concentration is shown, the FTC is entitled to a presumption against the merger on the merits, and therefore, does not need detailed evidence of anticompetitive effects at this preliminary stage."

And it's important for us to point out that we only have to show undue concentration in one market. In this matter, Your Honor, we have shown undue concentration, a strong presumption in two separate relevant product markets.

And in Warner Communications, from the Ninth Circuit --

THE COURT: Go ahead, and then I have a question.

MR. REILLY: The Ninth Circuit talks about what the Court's role is in this preliminary proceeding. The Court does not resolve conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues at the preliminary relief stage.

THE COURT: I am fairly certain, but I want to make sure that when you talk about markets you're not talking about Toledo and Lucas County; you're talking about the segments

within an institution, such as ProMedica or St. Luke's or other competing institutions.

MR. REILLY: Yeah, when we talk about markets, Your Honor, there are two markets that we define: The relevant product market, which could be obstetric services, general acute care services, and then the geographic market, which is Lucas County. Those two combined will get you the market shares and market concentrations. You have to do both to make those calculations.

And, again, the D.C. Circuit very recently held that the courts trench on the FTC's role when they choose between plausible, well-supported expert studies. Again, court after court has recognized, Your Honor, that this is a preliminary proceeding, and that the merits trial in this case is ongoing. The opening statements will be coming in May, and that is where the Congress wanted the Commission to do its job in the first instance.

I realize that this Court is very familiar with ProMedica and all the hospitals in Lucas County, but I guess for the benefit of maybe people in the galleries, I'll do a brief overview of ProMedica and then, St. Luke's.

ProMedica is a health system of 10 hospitals, not including St. Luke's, located throughout northwest Ohio and southeast Michigan. In Lucas County, ProMedica has three hospitals, the Toledo Hospital, 660 staff beds; Bay Park

Community Hospital with 86 staff beds, and Flower Hospital with 257 staff beds.

ProMedica also owns a for-profit Paramount Health Care, one of the largest commercial health plans in Lucas County, where it is clear that when Paramount makes business decisions, it considers the impact on the ProMedica hospitals. When ProMedica hospitals make business decisions, it considers the impact on Paramount. ProMedica's ownership of Paramount are not our primary issue we're relying on in this case on the merits trial, it does add to the likely competitive harm that will result from this transaction.

ProMedica is self-proclaimed as the dominant provider of healthcare. Month to month, ProMedica health system has market dominance in the Toledo MSA, and the self-proclaimed dominant hospital provider in Lucas County.

And I want to point out, Your Honor, that the first sub-bullet there, "ProMedica health system has market dominance in the Toledo MSA," that comes from ProMedica's presentation to Standards & Poor. It is not a middle manager in a cubical writing a memo that was never distributed and that no one read. This was an official ProMedica presentation to Standard & Poor. Standard & Poor relies on these presentations to give ProMedica its credit rating, and people rely on ProMedica's credit rating to lend money to ProMedica.

There is a strong fiduciary duty to be as fair and

accurate as possible when making presentations to Standard & Poor's, and they call themselves -- they said they have market dominance to Standard & Poor's.

St. Luke's is a general acute care hospital with 178 staff beds. It's located in Maumee, a southwestern suburb of Toledo. I think there's no dispute about this at all, Your Honor, that St. Luke's ranks high in quality and patient satisfaction. The hospital is regularly recognized by third-party quality rating organizations that rank St. Luke's within the top 10 percent of hospitals nationally. St. Luke's has very high clinical outcome measures and high patient satisfaction scores. And the fact that St. Luke's is a very high quality low cost hospital is not disputed by the Defendant.

In their submissions by the expert, ProMedica's submission by the expert in their pretrial briefings, ProMedica has claimed that St. Luke's is just not a significant competitor. They're just not significant. They have very few discharges per day, they have very few obstetrics discharges per day, and they say only 10 a day. But it's important to put this in context, Your Honor, in Lucas County. St. Luke's volume is greater than almost every other hospital in Lucas County. By commercial discharges, the things we're focusing on in this preliminary injunction proceeding, St. Luke's is the third largest hospital in Lucas

County, larger than UTMC on commercial discharges for general acute care services, larger than Flower, larger than St. Charles, larger than St. Anne, and larger than Bay Park.

So by some logic that you shouldn't be concerned about an acquisition of an insignificant competitor, that would apply to the vast majority under that standard of hospitals located in Lucas County.

THE COURT: Would you consider, Mr. Reilly, the self-proclaimed dominant hospital provider language that you've quoted just a few moments ago for purposes of this case as a -- an admission against interest?

MR. REILLY: Yeah, I would consider it an admission against interest because our theory is they have been telling people outside of ProMedica that they are dominant, and when you acquire a close, vigorous competitor like St. Luke's, they become even more dominant. The starting point prior to acquiring St. Luke's was they were self-proclaimed dominant provider in Lucas County. And when you acquire a close competitor you become even more dominant. Those sort of findings are relevant for an antitrust investigation and a merger investigation.

So don't take our word for it that based on our numbers that St. Luke's is the third largest hospital in Lucas County. Mr. Wakeman, the CEO, recently was celebrating the same fact. He wrote in a July 2010 e-mail to other executives

at St. Luke's, [redacted]

They are a significant hospital by any standard within Lucas County.

ProMedica has also argued that St. Luke's is not unique. They don't offer any unique services. Everything they offer is offered at the ProMedica hospitals. And, Your Honor, that's exactly the point. That's why we're here today. If St. Luke's offered only psychiatric care, offered something that ProMedica didn't offer, we wouldn't even open an investigation. The fact that they're offering the exact same services that ProMedica does and they're competing vigorously to draw and attract patients, that's why we're here. The fact that St. Luke's does not offer unique services is a reason why there's a competitive problem from this acquisition. It's not a reason why there isn't a problem.

ProMedica and St. Luke's have termed this acquisition as a joinder. I just want this Court to be clear that the joinder is a functional equivalent of an acquisition. ProMedica acquired St. Luke's as Ms. Hanley said in an investigational hearing, that St. Luke's has become us.

And ProMedica's economic and decision-making control at St. Luke's is not disputed. They will negotiate health

plan contracts at St. Luke's, approve strategic plans, annual operating and capital budgets, and they will pool St. Luke's funds and assets with ProMedica for investment. As PX223 states, bottom line, for accounting purposes, ProMedica has acquired St. Luke's. So while it's being termed as a joinder, it is an acquisition under Section 7, and it is de facto control of St. Luke's by ProMedica.

We also heard some talk about, well, St. Luke's has -- still has an independent board, and so they will play some role in making sure that the hospital keeps the same services and so in some ways that the order is not necessary because of the independent St. Luke's board.

Prior to the acquisition, Mr. Wakeman, the CEO of St. Luke's, predicted that ProMedica would have a window dressing local board for St. Luke's. And he was right. Within 18 months, ProMedica will have approval of two thirds of St. Luke's board, and it will have a right to remove any board member with or without cause after a short stub term, as it's called, after that period expires.

So let me give you, Your Honor, a brief overview of a Section 7 case, prima facie Section 7 case established when the FTC makes a showing that the transaction would lead to undue concentration in the market for a particular product in a particular geographic area. The D.C. Circuit in Whole Foods thought that even at this preliminary stage, the FTC did not

have to determine what the relevant product markets were. We have, in fact, alleged two relevant product markets fully supported by the evidence, and both of those markets, as I will show, there is a significant undue concentration which creates a presumption of illegality of this transaction in which the Defendants have to rebut. Once we show our -- once we meet the burden of our presumption, the burden of production shifts to the Defendant to attempt to show that the presumption does not accurately indicate probable anticompetitive effects. That's what they have to do after we meet our presumption, and if they don't, we're entitled to preliminary relief.

The first relevant product market is general acute care inpatient hospital services. That is what we call a broad cluster market of inpatient surgical, medical and supporting services that are provided in a hospital setting to commercially-insured patients. It excludes outpatient, psychiatric and tertiary services but includes most of the basic services that require an overnight hospital stay.

And there is no dispute, Your Honor, by Defendants that this is a relevant product market, it's appropriate, and this is consistently recognized by the courts, including the Sixth Circuit, as being an appropriate market.

So when I say cluster markets, Your Honor, what that means is, I think everyone in this Court knows that knee

surgery is not a substitute for a hip surgery, for example. You're not going to get a hip surgery if there's a price increase for knee surgery, but it's a cluster market.

It's really an analytical tool for convenience. You put all the general acute care services in a cluster, and you analyze the competitive effects and dynamics of the cluster, rather than going service by service by service. It would be appropriate to go service by service, but I think the courtroom will be pretty empty by the time we get into about 20 services because of the tedium of doing that.

But it's important to remember the only services that should be put in the cluster are the ones that have the exact same competitive dynamics and market participants as the other goods in the cluster. That's when you do it. In the Southern District of New York in 2009, the Emiga Group said it very well: "It's used as a matter of political convenience because there's no need to define separate markets for a large number of individual hospital services when market shares and entry conditions are similar for each."

And that's the key language, Your Honor: When market shares and entry conditions are similar for each. If they're not, there's no discretion to put it in the cluster. You cannot put a good in the cluster market that has different market participants and different market shares because it would mislead this Court and imply that, yeah, this same

competitive dynamics exists for the other services.

Our expert, Professor Town, stated that the purpose of the cluster market is to formulate aggregates across those products in order to do the analysis in a practical way. And that's what it is, it's practical convenience. That's why we use cluster markets.

In Little Rock Cardiology, it was clear that if there's some good that there is no overlap, some service that one hospital offers that the other doesn't, it's not appropriate to put in the cluster market. So in this case the cluster market is the cluster of services offered by St. Luke's for which ProMedica hospitals overlap, meaning offer the same services.

The second relevant product market is inpatient obstetrical services. I think it's safe to say there has been a dispute about this relevant product market, and there is a very simple reason why obstetrical services should not be put in the general acute care cluster market services.

UTMC and Mercy St. Anne do not offer obstetrics. So in our general acute care market, UTMC is a competitor. They have some share. And by putting obstetrics in that cluster, we're saying, well, UTMC looks like they still have some share and presence. They don't. You move goods, services form a cluster when the market participants and market shares are different.

And that's why we are having a separate market for obstetrics to account for the different competitive conditions. It's the exact same reason, Your Honor, why you exclude outpatient and tertiary services from general acute care. For outpatient services there are usually many more competitors. There might be many more competitors, there could be ambulatory surgical centers, there could be imaging centers. There could be a lot of things that make the competitive dynamics different. That is why we exclude outpatient, that's why tertiary services are excluded from the general acute care product market, because the tertiary services people are willing to travel much further. Those services are not in the general acute care market.

In the Sixth Circuit, even set up different markets based on different competitive conditions. This is the Butterworth case. Where in Butterworth in the Sixth Circuit accepts two market definitions, general acute care inpatient hospital services and primary care inpatient hospital services, each with different competitors.

I don't think -- I don't think there's much reason to guess why the Defendant is fighting so much on us alleging a separate market for obstetrics. And it's really for a simple reason. To the market for obstetrics, this acquisition creates a merger to duopoly with ProMedica having more than 80 percent share. And the Defendant is fully aware that no

court has ever sanctioned a merger to duopoly, never mind in a 13(b) setting, and that's why we're fighting over this.

So the Defendant has come up with a couple arguments that we understand of why there shouldn't be a separate market for obstetrics. One is that negotiating rates -- they argue that when you negotiate rates as a bundle, it doesn't really matter what the market power is for any one good, the bundle price is all that matters. And it's pretty clear analytically that negotiating rates for a bundle of services does not prevent the exercise of market power over any one service.

The simple analogy, is Your Honor, if you had two goods and they're both competitive goods and you're buying them in a bundle, and you got a monopoly in one, you'd expect the bundle price to reflect the market power for one of the goods. It's not, that, oh, as long as you have some competition for one of the goods, that market power over all the other goods won't be exercised.

And Professor Town explains in paragraph 81 of his expert declaration the rationale and reasoning for that. ProMedica's expert did not give an opinion on this.

Also another reason, even putting aside that the price of the bundle will reflect the market power for each individual good in that bundle, there's also another very important fact, and we've redacted this. Hospitals in Lucas County, including the hospitals St. Luke's and ProMedica often

carve out, often separate for OB services separately. So to the extent that the price of the bundle of goods -- this is page 21, Your Honor.

THE COURT: I'm there. Thank you.

MR. REILLY: To the extent that there's any reason to believe, which there isn't, that the price of the bundle will somehow reflect competition throughout the entire bundle rather than the market power for any good, ProMedica, after the merger to duopoly, with more than an 80 percent share in this market could easily tell health plans, let's contract for obstetrics separately and here's what the rate's going to be. The bundle doesn't protect health plans and employers from a carve-out. These carve-outs happen a lot in Lucas County. We've given you several examples in your slides, and it surely will happen after ProMedica has an 80 percent-plus share.

Now I'm turning to relevant geographic market. We've just talked about relevant product market. And this is usually, Your Honor, usually in hospital merger cases where the biggest fight occurs. The FTC typically alleges a narrow geographic market, and the Defendant alleges a much broader geographic market. The reason being the broader the geographic market, the less concentrated the market is.

And so let me tell you what the key question is to determine geographic market. If a hypothetical monopolist acquired all of the hospitals in Lucas County, could it raise

rates to commercial health plans by five to 10 percent? That's a question. So let me put this in context of Lucas County.

We're here today because ProMedica acquired St. Luke's, and we think the evidence overwhelmingly demonstrates that there will be dramatic price increases at St. Luke's and also very likely price increases at ProMedica, as well. To determine relevant geographic market, it's a different test. What it means, Your Honor, is if ProMedica acquired Mercy St. Anne's, Mercy St. Charles, Mercy St. Vincent's, UTMC and St. Luke's, if ProMedica, for example, had a monopoly, controlled all of the hospitals in Lucas County, could they raise rates by a mere five to 10 percent? And if the answer to that question is yes, then the geographic market is Lucas County.

And that analytical tool which is in the guidelines, in the case law, is not in dispute.

And throughout the six-month investigation and even today, it appears to us that the Defendant concedes the relevant geographic market is Lucas County for general acute care services. And for good reason. I don't think there's any evidence in the entire record that would lead one to believe that if ProMedica acquired all the Mercy Hospitals, UTMC, and St. Luke's, they would not be able to raise rates by a small but significant amount, five to 10 percent.

And the supporting evidence on the geographical market is this slide 22, Your Honor, is very strong. We have health plan testimony that support this geographic market, testimony from other third-party hospitals. We see when you look at who's leaving Lucas County for general acute care services, very, very few are leaving, less than three percent of Lucas County residents are getting care anywhere else. They don't travel for general acute care services.

And for obstetrics patients, it's less than one percent of Lucas County residents are leaving Lucas County. The appropriate geographic market here is Lucas County for both general acute care services and for obstetrics.

Again, talking about obstetrics and the merger to duopoly, only ProMedica and Mercy offer OB services after this acquisition.

For the general acute care market, ProMedica's own expert acknowledged that it's more likely than not that Lucas County is the general acute care market under the hypothetical monopolist test.

And so when we're trying to determine what the relevant geographic market is for obstetric services, here's basically what it comes down to. So the Defendant acknowledges that for the hundreds of services in the general acute care bundle, the appropriate geographic market is Lucas County. But for the one service, the one service, obstetrics,

where it creates a merger duopoly, they're implying that Wood County Hospital should be in that geographic market.

So for the hundreds of services in general acute care, geographic market, Lucas County; for obstetrics, Lucas County plus Wood County. And Your Honor, I have to tell you that's pretty implausible, with all due respect. I could see if you're having elective hip surgery, you might be willing to travel a little bit further for a general acute care service such as that. But when the woman is in labor and there's quite a rush to get to the hospital, no one is going from Lucas County to Wood County. We made the drive from the center of Lucas County to Wood County Hospital. We made the drive from St. Luke's to Wood County Hospital.

I also happen to have a six-month pregnant wife at home. The entire time I was making that drive I'm like, my wife would kill me if I drove her all the way to Wood County to have the baby. There aren't enough flowers around that I would have to buy her for that anger she would have.

And the numbers support this, Your Honor. Only six-tenths of one percent of Lucas County residents obtain OB services outside of Lucas County. For Wood County, it's less than two-tenths of one percent. No one from Lucas County is going to Wood County to deliver their babies. They wouldn't go to Lucas County if there's a monopoly, they wouldn't leave Lucas County if there's a monopoly or a slight price increase

for obstetrics. And so the appropriate geographic market for both the general acute care services and the obstetrics market is Lucas County.

I'm just showing you again, affirming what I just mentioned, that the average driving time, and even looking at the percentiles, for obstetric services is only 11.3 minutes. Even for the five percent of patients who travel the longest, the average drive time is just 24.5 minutes. Wood County Hospital is 33 minutes away from central Lucas County.

I know Your Honor is very familiar with Mercy health partners, so I'll be very brief on this. Mercy health partners has three hospitals: St. Vincent's, St. Charles and St. Anne's. St. Anne's, again, Your Honor, does not offer obstetrical services.

One thing that this Court might not realize, that in the geographic and prior market that we've alleged, Pro -- Mercy is 60 percent smaller market share than ProMedica. You hear a lot about there being a mirror image, ProMedica and Mercy is identical. Mercy is 60 percent smaller market share than ProMedica. ProMedica's significantly larger.

And in the southwest Lucas County, where in particular St. Luke's and ProMedica are fighting for patients, where the patient's number one and number two choices are either ProMedica or St. Luke's, Mercy's share is very small, almost 25 percent less than both ProMedica and St. Luke's.

They are not mirror images or identical, and of course, Mercy does not have ownership in Paramount or any other health plan.

UTMC has 226 staff beds. They do, of course, offer tertiary services. Their market share for the general acute care market is about equal to St. Luke's, and they, too, do not offer obstetrical services.

So, again, the Defendant has basically claimed that ProMedica and Mercy are twins, they're mirror images of each other, and let's look at what the differences are.

For inpatient market shares, ProMedica is almost 47 percent, Mercy's 28.7 percent. And, Your Honor, this is before ProMedica acquired St. Luke's.

For obstetric market shares, ProMedica has a 71.2 percent share, Mercy a 19.5 percent share. And, again, Your Honor, this is before ProMedica acquired St. Luke's and now has over an 80 percent market share, an extraordinary market share in obstetric services.

ProMedica offers OB services at all Lucas County hospitals, Mercy does not. ProMedica owns an integrated health plan, Mercy does not. [redacted] They are not mirror images of each other, Your Honor, despite where the location and the maps of the Defendant shows.

So we've talked a lot about the standard in 13(b), and we've mentioned the presumption of illegality once we show undue concentration. This slide, Your Honor, shows what we're talking about. There's not only a strong presumption, there's actually a very strong presumption of competitive harm that this merger has created. And the Courts have found there to be a presumption of illegality at even lower levels than this. The merger guidelines have a HHI of 2500 or more. That's a highly concentrated market. If the market becomes more concentrated by a level of 200 and that becomes a point where the presumption is created under the merger guidelines, and the courts have even a lower standard historically for when the presumption is created.

As we talked about, this acquisition exceeds these standards for a presumption by a wide, wide margin.

For general acute care, ProMedica and St. Luke's shares 58.3 percent of the Lucas County market. The post-acquisition, HHI is 4,391, 4,391. That is almost 2000 points above what the guidelines call are a highly concentrated market.

And the change in HHI for the general acute care market is 1078, almost five times, more than five times the amount necessary for us to be entitled to a presumption that this merger is illegal, which is very important in the merits trial and is even more important in a 13(b) proceeding.

For obstetrics, the market shares are, as I said, again, Your Honor, extraordinary. ProMedica and St. Luke's has a combined 80.5 percent market share. The post-acquisition is 6,854, which is almost three times as much as what you need for a highly concentrated market, and the HHI increase is 1323, almost seven times higher than what you would need to get the presumption. This is a very, very strong presumption and creates an incredible challenge for the Defendant to rebut, which they must in order to prevail here.

Amazingly, Your Honor, for general acute care, the Defendant has conceded that that's the right market, those are the right market shares, and that the presumption based on these numbers alone are intact. That's not an issue of dispute here. They've conceded that that for general acute care is the appropriate market and the appropriate market shares.

As I mentioned, the Supreme Court and other courts around the country have put a lot of weight on the presumption of illegality. It's very important for them because, again, once you get market shares and market concentrations that are that high, there is a strong presumption that the merger's illegal and that the merger will cause competitive harm.

THE COURT: Pardon me.

MR. REILLY: Sure.

THE COURT: That the mergers are illegal or legal?

MR. REILLY: The mergers are illegal.

Philadelphia National Bank, a Supreme Court case in 1963, combined share was 30 percent for the merging companies. The Court held that that merger was illegal.

University Health, Eleventh Circuit hospital merger case, the combined share was 43 percent. The Eleventh Circuit found that merger was illegal.

Cardinal Health, another 13(b) case, combined share, there were two mergers there, 13 -- 37, excuse me, and almost 40 percent. The Court found that that merger was illegal.

And then the Northern District of Ohio, 198413(b) case, Bass Brothers, 29 percent combined share. The Court found that that merger was illegal. All these based on the presumption.

ProMedica, general acute care market share is 58 percent, for obstetrics 81 percent, far in excess of the combined market shares that courts have already found to be illegal because of the presumption.

So what do the Defendants argue? They've conceded that there are very high market shares here, and -- for at least the general acute care. And for obstetrics, their pretty extraordinary market share's even higher. So I think they're arguing that market shares don't matter, they don't matter, this Court shouldn't consider the strong market shares, the high market shares and the strong presumption as

created from this acquisition. So what we did is we put up the market shares of every participant in Lucas County: 11.5 for St. Luke's, 13 for UTMC, 28.7 for Mercy, and 46.8 for ProMedica.

We're trying to test, do these market shares predict higher prices, predict the rates that those hospitals are able to get from health plans? And what you'd expect to see if market shares really weren't relevant or didn't have any meaning is pretty much a straight line. Each hospital would get very similar pricing levels. In fact, you might expect that the larger hospitals would have lower cost because all these alleged efficiencies and their pricing would be lower.

Well, Professor Town, our expert, analyzed the relative pricing for each hospital in Lucas County controlled for acuity, meaning that it was an apples to apples comparison, to the volume adjusted basis. And it's important to know that he was the only expert in this case who looked at relative pricing at both hospitals.

Ms. Guerin-Calvert, ProMedica's expert, did not. So this is what Professor Town's pricing level has found.

St. Luke's, with the lowest market share, has the lowest pricing, UTMC with slightly higher market share has slightly higher pricing, Mercy with higher market share than UTMC, has higher pricing, and ProMedica, with its 40, almost 47 percent market share, has the highest pricing. So rather

than market shares being meaningless predictors of pricing and rates that hospitals can get from health plans and employers, it's almost a perfect predicter.

In fact, Your Honor, if someone asked you to guess or predict what the hospital rates are for each hospital and what they get from health plans and from employers, if you could have one piece of information, one piece of information to predict that, it would be market shares. Market shares mean higher rates in Lucas County. This acquisition, added to ProMedica's dominance by already adding to their very high market share and the very high pricing power in Lucas County.

As I already mentioned, Your Honor, and hopefully demonstrated, that the market shares and market concentration figures alone, alone create a very strong prima facie case. Because of the market shares and the market concentration numbers, there is a very strong presumption recognized by the courts, recognized by the merger guidelines that this merger is illegal because it would create and cause competitive harm to the citizens of Lucas County.

But we do not rest on the presumption. We could. We could sit down, and I don't think the Defendants can rebut the presumption, especially in a 13(b) proceeding, where all we have to do is raise serious and substantial questions, that's all we have to do, and the presumption alone gets us to that point on the likelihood of success. But we didn't stop there,

Your Honor.

We have put together an extraordinary number of documents, over a thousand exhibits that support our theory of competitive harm and bolster the presumption, expert analysis, five expert reports, 16 investigational hearings, 17 employer declarations, four hospital declarations, five physician declarations, six health plan declarations, eight fact witness depositions and four expert depositions.

So to the extent that we are standing before this Court, who's making a very important decision, expecting a rubber stamp because of our presumption, that is not true. We have gathered a lot of evidence, and this evidence doesn't weaken the presumption, it doesn't maintain the presumption; it strengthens the presumption.

And one fact alone, as we already talked about, the relative pricing at each of the hospitals, ProMedica's pricing is more than 70 percent on average more expensive than St. Luke's. And so if all that happened in this merger, if all that's happened is that ProMedica raised St. Luke's prices to ProMedica's own current rates, prices would go up to extraordinary levels. This is what health plans which we talked about are very concerned about. This is what St. Luke's board expected to happen, and also, even though there are statements to the contrary, this is what ProMedica expected to happen and tell its potential partners this.

And we haven't even talked, which we'll talk about later, what happens when a self-proclaimed dominant firm becomes more dominant, what happens to their ability to get higher prices from health plans and employers in Lucas County? This is just a simple fact that if St. Luke's, now that they're part of ProMedica, now that they no longer have 10 percent market share and have a 60 percent market share for general acute care services, have an 80 percent market share for obstetrics, what will happen to their prices.

So the statement has been made by Defendants pretty frequently that they're shocked, shocked that St. Luke's had in their documents all about this extraordinary, outstanding managed care pricing of ProMedica, how St. Luke's rates will increase dramatically and saying that they never got that from them.

Well, Your Honor, they did get it from them. This is a partnership presentation that ProMedica makes to potential partners. This is what, kind of nice to meet you, let me tell you what the benefits are of joining ProMedica. One of the benefits are payor system leverage. ProMedica tells that, to try to get potential partners to join them.

And to be clear, when business people use terms like leverage and clout, they're describing market power, Your Honor. Payor system leverage, ProMedica's using that as a marketing tool to say, come join our partnership, we have

payor system leverage, and you will have it, as well, if you join us.

We're going to go through a lot of St. Luke's documents and make this exact same point that are perfectly consistent with that theory in this case these are ordinary course documents from the highest St. Luke executives, most often the CEO, sending memos to the board of directors. These are not, again -- there is a middle manager defense that we hear about, that this middle manager wrote this, he or she didn't know what they were talking about, ignore it.

I have yet to hear a crazed CEO defense or a crazed board of directors defense. These documents that we're going through right now were sent by senior executives at St. Luke's to the St. Luke's board of directors so that the St. Luke's board of directors could make the most important decision they have had to make in years, at least 15 years, according to Mr. Wakeman, the CEO.

St. Luke's talks about it, if they joined a system in Lucas County, their value would be diluted and their payments will skyrocket, skyrocket. That's what would happen to their rates if they joined the system.

This is their presentation that Mr. Wakeman, the CEO, made to St. Luke's board of directors in deciding what should they do going forward in terms of remaining independent or look for a partner. Mr. Wakeman presented to the entire board

of directors: ProMedica, believed to have the most favorable managed care contracts in the area. Again, on another page, impact on community, the St. Luke's affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-St. Luke's partnership would have a lot of negotiating clout. This is St. Luke's to its board of directors in talking about one of the benefits of joining ProMedica.

And just to make sure everyone understood, this is from the due diligence meeting, and ProMedica or Mercy affiliation could still stick it to employers. That is, in case there was any ambiguity, to continue forcing higher rates on employers and insurance companies. That's the impact that St. Luke's anticipated from this acquisition. That's consistent, perfectly consistent, why we're here today, that this merger will harm consumers, that this merger's not good for the community because it will result in higher rates for employers, employers in Lucas County. St. Luke's, prior to the acquisition, agreed.

Again, talking about if they join, they go to the dark green side. This is -- I think refers to ProMedica. We may pick up several million dollars in additional health plan fees. Again, join ProMedica, get higher rates from health plans, get higher rates from employers, and that was the anticipated likely effect of joining ProMedica. There's no

ambiguity here, Your Honor, none at all.

Again, another document. This is from Mr. Wakeman, the CEO, to board members. If we consider merging with one of the large systems, any hope of lower cost and improved quality will be diminished. Again, anticipating the likely impact and effects of joining a large system like ProMedica.

So we have ordinary course documents from ProMedica and from St. Luke's that fully anticipate what will happen to rates when St. Luke's joins ProMedica. This is slide 37, Your Honor. We redacted the specific testimony. This is what the health plans are saying about the transaction: I expect a rate increase of approximately 20 to 30 percent within three years. The acquisition could also give ProMedica enough leverage to increase rates across all of its Lucas County hospitals.

Another rating plan. St. Luke's actual reimburse rates are 40 to 55 percent lower than Flower and Park. After acquisitions, rates of the -- the rates of the community hospital rise to acquirer's rates.

And so there is a lot more testimony from health plans. It's important, Your Honor, to point out that, especially in light of ProMedica's argument that this acquisition will improve quality of care, improve coordination of care, result in better outcomes, fewer unnecessary tests, less readmissions, all these great things, health plans, to

the extent that they believe it, should be very supportive of this acquisition. They should be, because lower healthcare cost is good for them and good for their bottom line. There is not one health plan, not one health plan, there's nothing in the record that shows any support by any health plan for this acquisition.

In some of the predicted rate increases that you have on your redacted slide, you may note that those are, for the numbers we put in there, lower than the 70 percent estimate of Professor Town. In fact, the 70 percent is a average based on adjusted for volume. And so for one health plan has significantly low lower rates at St. Luke's than at ProMedica, which in this case it does, you'd expect to see different health plans having different rate differentials.

And also, Your Honor, I think it's important to point out that we're still talking about dramatic price increases, whether you're evaluating how much more expensive ProMedica is now for the same services than St. Luke's, what the health plans are saying, we are having some sort of a range of what the likely price increases will be after this acquisition at St. Luke's, and all of them are dramatic and extraordinary. There are no single-digit rate increases anywhere in the record that are predicted by anyone.

In addition to health plans, local employers are concerned about the competitive harm for this transaction.

Slide 38 has a bunch of them. I'll just read a couple because obviously you can read them, Your Honor.

One very large employer. "I'm concerned that ProMedica's acquisition of St. Luke's will lead to higher healthcare costs for our employees in the Toledo area."

Another one. "I am concerned that ProMedica's acquisition of St. Luke's will enable it to demand higher rates."

So there is -- there are documents in St. Luke's and ProMedica that talk about higher rates, health plans expect higher rates, local employers expect higher rates. This is the type of evidence that on top of the already strong, irrebuttable presumption we are bringing forth in a 13(b) proceeding, where we're only required to raise serious substantial questions.

So I think it's pretty clear, we hope it is, Your Honor, that market shares do matter and that market shares are a very strong predictor of pricing by hospitals in Lucas County.

So it seems like what the Defendant argues next is that St. Luke's and ProMedica, they're really not close substitutes. They're not vigorous competitors, in the hope that even though ProMedica acquired St. Luke's, as long as they don't acquire a vigorous close competitor, there shouldn't be any issue.

Well, again, Your Honor, the documents that St. Luke's and ProMedica created not for this Court, but while they're running their business, belie that point. [redacted] This is done, again, during the ordinary course of business.

And also, ProMedica and St. Luke's compete vigorously for the same patients. Again, really right around St. Luke's primary service area, a core service area as they define it. Based on market share data on zip codes that ProMedica's expert put forth, it's clear that ProMedica and St. Luke's have the top two general acute care market shares in eight of St. Luke's top 10 zip codes. In these zip codes Mercy is much smaller. Patients in that area prefer to go to either St. Luke's or ProMedica hospitals. They're the number one and two choices, and that's why it's important for health plan networks to have either one in the network.

This is, again, St. Luke's core service area. St. Luke's calculated market shares not for this review of the Court but in the ordinary course of business, as well. And in their calculations, ProMedica and St. Luke's market shares are

substantially higher than Mercy for both general acute care and obstetrics, and I have the PX numbers there, as well.

In all but one zip code in this area, ProMedica and St. Luke's were first and second by market share.

And, again, in an ordinary course document by [redacted], they define the southwest Lucas County area, and they acknowledge -- this was not made for litigation. They acknowledge that their presence in southwest Lucas County is significantly smaller than ProMedica and St. Luke's, having almost an 80 percent share for ProMedica and St. Luke's, with [redacted] and [redacted] much smaller. And Mr. Wakeman acknowledged that ProMedica was the most significant competitor of St. Luke's in the core service area.

ProMedica and St. Luke's compete and compete vigorously and compete for the same patients, especially in that area around St. Luke's, and that competition will be lost or is lost because of this acquisition.

There's also been a claim that St. Luke's just does nothing unique, they're not a significant competitor. We don't even really bother with them. We don't notice them. They're not doing well financially, and so they don't matter. And so if St. Luke's doesn't matter, the acquisition by ProMedica shouldn't matter. Again, this claim is belied by the evidence. ProMedica knew it was losing market share and revenues to St. Luke's. They knew it. They recognized that

in their documents. St. Luke's was stealing market share from ProMedica. ProMedica was very worried, which I'll talk about more, about St. Luke's readmission to Anthem for the simple reason, it would cost ProMedica millions of dollars.

Again, if St. Luke's wasn't significant, if they weren't a close substitute for many patients, adding St. Luke's into a health plan network should have had no or very little impact to ProMedica. Again, natural experiment evidence that ProMedica and St. Luke's were very close substitutes.

And ProMedica did not want Paramount to add St. Luke's to its network again for the very, very simple reason that if St. Luke's was added to Paramount, ProMedica hospitals would lose a significant amount of business. St. Luke's has the ability and has taken patients and share away from ProMedica, and that again is lost because of this acquisition.

And this is a environmental assessment document from ProMedica, 2010, very recent. ProMedica writes, in metro Toledo, ProMedica's share of the inpatient market declined [redacted] through nine months of 2009, with St. Luke's hospital picking up [redacted].

And just so we're clear, that one percent share doesn't seem that impressive, that is millions of dollars. One percent of the inpatient market is millions of dollars, and that's what St. Luke's was stealing from ProMedica.

And when ProMedica notices this and says, really, what should we do about this, there are really two options. One is to improve the services at the ProMedica hospitals, improve patient satisfaction levels, improve amenities so you basically are giving these patients who are choosing St. Luke's a reason to go to ProMedica, or you can acquire your close competitor who is stealing share from you and then recapture a substantial portion of recent losses.

The first option benefits consumers, the second option doesn't.

And also, before we go on to the next document, ProMedica has claimed that St. Luke's is really an unattractive option. Look at their numbers, look at people who are going there. Patients weren't going there, they had low occupancy rates, there's nothing unique about them. There was nothing attractive about St. Luke's that would really compel or persuade a person to go there.

That, Your Honor, is again belied by the evidence. St. Luke's was stealing share, and ProMedica knew that if St. Luke's is included in the health plan network, patients who were choosing ProMedica would then go to St. Luke's, and that's what happened.

So St. Luke's was excluded from Anthem's network in 2005 and readmitted in 2009. We're going to talk a fair amount about the steps, the extraordinary steps that ProMedica

took to make sure that St. Luke's wasn't added into Anthem's network. But ProMedica estimated that St. Luke's readmission to Anthem's network would cost, and it's on page 43, a significant sum of money.

St. Luke's market share in the core service area once [redacted] added St. Luke's to its network went up significantly by almost [redacted], while ProMedica's market share and in St. Luke's core service area declined. Mercy and UTMC shares stayed the same. Again, that shows closeness of competition, Your Honor. That shows vigorous competition. Patients who couldn't go to St. Luke's are going to ProMedica. Once [redacted] patients were allowed to choose St. Luke's and use them in that work, ProMedica lost significant share, St. Luke's gained significant share, and Mercy and UTMC's shares stayed the same.

St. Luke's was excluded from Paramount. Paramount is, of course, owned by ProMedica in 2001 and readmitted in 2010. They're readmitted after this acquisition was consummated, not before.

ProMedica estimated that St. Luke's readmission into Paramount would reduce impatient admissions by up to [redacted] per year at the other ProMedica hospitals.

And it's interesting to note, Your Honor, that by adding St. Luke's to the Paramount network, UTMC would only lose [redacted] by this projection, admissions a year. In Wood

County, [redacted]. [redacted]. So when St. Luke's is added to Paramount, ProMedica lost by far the most number of inpatient business. UTMC, a fraction of that, and Wood County [redacted]. And, again, these are projections based right before -- right before ProMedica, Paramount added St. Luke's.

THE COURT: Would you go back one?

Okay. Thank you.

MR. REILLY: And this loss of admissions by adding St. Luke's to Paramount was a big concern for ProMedica executives. They knew by adding St. Luke's into the Paramount network ProMedica would lose share, would lose business, St. Luke's would gain.

You do not see this. You do not expect this to happen if St. Luke's is an insignificant, meaningless, irrelevant hospital, or if it's not located in an area where both St. Luke and ProMedica are vigorously fighting for patients.

And one thing I thought was very interesting in the same document, PX40-008, was also estimated that by Paramount adding St. Luke's to its network, Paramount's enrollment could upper bound increase by [redacted]. And, again, that's very interesting if you do believe, as the Defendants claim, that St. Luke's isn't meaningful, they're insignificant. Just that act alone of adding St. Luke's to Paramount's network would cause people to switch to Paramount because now they have

access to St. Luke's. Again, a vibrant, high quality, low cost hospital that was independent and now is part of the dominant system in Lucas County.

One thing that I think surprised many of us was when you see a very large system with a very large market share like ProMedica, if you look at the St. Luke's documents, you see a lot of references to ProMedica. They're fixated and focused on the dominant firm, the 800-pound gorilla, as they say.

And you look at the large systems documents or look at their actions, you really do see that the large system really isn't that concerned, or ignores, it doesn't even notice the small independent competitor.

Here, Your Honor, it literally is amazing how much ProMedica fixated on St. Luke's, sought to have them excluded from health plans, not just one health plan, several health plans, and really took all these actions to make sure that St. Luke's wasn't in health plan networks, because, again, St. Luke's had the ability and did take business and patients from ProMedica.

ProMedica charged a tax to health plans, meaning if you added St. Luke's to your network, we're going to charge you to do that, charge higher rates. And then, of course, we talked about ProMedica refused to allow Paramount to include St. Luke's in its network for the simple reason that they

would lose business.

ProMedica engaged in a prolonged and sustained effort to keep St. Luke's out of [redacted]. And this is clear in the documents. They did not want St. Luke's in the [redacted] network and have to compete with them on a level playing field.

This is a ProMedica-[redacted] 2008 letter of agreement. ProMedica writes in the letter of agreement, [redacted] will not add any participating network hospital provider located in western Lucas County. And if they do, they'd have to pay an additional 2.5 percent. That's what ProMedica did to make sure that St. Luke's wasn't in [redacted] network. They didn't want them in there, again, because of its location and its ability to compete against ProMedica, it would steal business and steal share from ProMedica.

In this document I think, Your Honor, from [redacted], I think speaks volumes, because ProMedica has said to this Court in papers, and will likely say, that these health plans are very large, they have all the leverage, they tell us what rates they want us to charge, and we charge them. The health plans have all the power.

Well, if they do, one would wonder why ProMedica already has extraordinary rates today, much higher than any other hospital in Lucas County. But this is what ProMedica writes about [redacted], a very large health plan. [redacted] cannot

sign up St. Luke's until January 1st, 2009.

THE COURT: I think you misread that.

MR. REILLY: [redacted] cannot sign up St. Luke's until, I'm sorry, July 1st, 2009, and will have to pay ProMedica for the privilege. So if [redacted] wants to add St. Luke's into its network, ProMedica wrote that [redacted] would have to pay ProMedica for the privilege.

That doesn't sound like all-powerful health plans to me, Your Honor.

Just so there's no ambiguity, why did ProMedica want St. Luke's excluded from the [redacted] network? It says it right here in this document: Toledo network to exclude St. Luke's, and increase in market share. No St. Luke's means ProMedica has more and more business and higher market share.

MR. MARX: Your Honor, I don't want to interrupt Mr. Reilly, but I do want to note that some of these documents that we're publicly displaying were submitted by ProMedica and by St. Luke's for confidential designation, and in that respect should be treated as such. Unless we waive the privilege, I don't think the FTC should be disclosing some of that information publicly.

THE COURT: I'd like to have you indicate over -- jointly, if you can, over the noon hour, which of those documents they are, and I will make an appropriate open court order --

MR. MARX: Thank you.

THE COURT: -- that they not be used outside of this hearing by anyone other than the Court.

MR. MARX: Thank you, Your Honor.

MR. REILLY: Going to slide 50.

ProMedica --

You actually can take that slide off just in case, I don't know.

ProMedica had told [redacted] that if they added St. Luke's to the network, that was a deal breaker. If they didn't delay 18 months, that was a deal breaker. Little insignificant St. Luke's, the inclusion of them in the [redacted] network was so important to ProMedica, or the exclusion was so important to ProMedica, that ProMedica called [redacted] adding them a deal breaker.

Again, Your Honor, St. Luke's is a very important, very significant close competitor to ProMedica. ProMedica knew that, and they acted accordingly, to make sure that they got the upper hand.

Slide 51, Your Honor. This testimony from a health plan that confirms once again that the motivation for excluding St. Luke's from the network was ProMedica's loss of volume. That's what they were concerned about, and this has been treated confidentiality, so I'm putting that excerpt in there for you to read and not putting on the screen.

So in addition to [redacted], ProMedica also sought exclusions of St. Luke's from [redacted] and [redacted], as well. It's not just one health plan, it's three separate health plans that ProMedica did not want St. Luke's in the network.

He wrote, ProMedica would like to see St. Luke's out of the [redacted] network. ProMedica indicated that would be an advantage to them. An advantage to them, of course, would be they wouldn't have to compete on a level playing field with St. Luke's, and ProMedica would not be losing share and patients to St. Luke's, evidence of close competition.

Same with [redacted], Your Honor. Determine opportunity for St. Luke's exclusion and OP services exclusion, a ProMedica document.

And St. Luke's didn't have its head in the sand, Your Honor. ProMedica's fixation on St. Luke's was not a secret. St. Luke's knew exactly what was going on and they wrote, slide 55, ProMedica desires the St. Luke's geographic service area, so they will continue to starve St. Luke's through exclusive managed care contracts and owned physicians. St. Luke's knew what ProMedica was up to and knew they had a plan of fixation on them, and St. Luke's expressed a lot of frustration about that because they were wanting to compete against ProMedica.

ProMedica leadership also refused to give Paramount members access to St. Luke's. We talked about this before.

I'm going to go through a few of the documents on this.

It was clear that Paramount leaders wanted St. Luke's in. This is a St. Luke's presentation. And ProMedica leaders wanted to keep St. Luke's out. Paramount will only let us back in under certain conditions.

So as we talked about it, just to reiterate, Paramount leaders, by adding St. Luke's, would have a more attractive network. They would be adding a hospital that a lot of people like to go to because of its very high quality and patient satisfaction levels. ProMedica did not want Paramount to add St. Luke's because of the loss of business to ProMedica.

And St. Luke's believed that Paramount would only let them back in when we give them the keys, meaning that they give St. Luke's -- ProMedica acquires St. Luke's, and that's what had to happen before St. Luke's was added back into Paramount.

Do you want to take a break now, Your Honor?

THE COURT: Is this a good breaking point for you?

MR. REILLY: Absolutely.

THE COURT: All right. Ten, 15 minutes.

(A recess was taken from 10:30 a.m. to 10:46 a.m., after which the following proceedings were had:)

THE COURT: Please proceed, Mr. Reilly.

MR. REILLY: Thank you, Your Honor.

So we're on slide 59. In the interest of time, I think I have made a few cuts from the slides, so I will say the slide number to an extent, not for a while that I skipped some. Maybe I won't have to.

So St. Luke's had a view of ProMedica that was quite different than what they're presenting to this Court in affidavits and in testimony and depositions.

In 2007, St. Luke's considered an antitrust suit against ProMedica in response to the aggressive competitive tactics. One document from St. Luke's basically said, the antitrust lawsuit's an option, look into it. St. Luke's knew they were being excluded by ProMedica from networks, knew that they were harming their business volume because they could not compete on a level playing field for patients, and they're reviewing all their options.

Slide 60. In St. Luke's true view, ProMedica -- St. Luke's knew that ProMedica had an aggressive strategy to take over St. Luke's or put them out of business. There's nothing about saving St. Luke's in that document, Your Honor.

And this is not confidential. Slide 61, there was a -- St. Luke's true view of ProMedica at the Perrysburg Chamber of Commerce, in October 2008, Mr. Wakeman, CEO of St. Luke's, made this statement.

This is public notes from a speech. If we are going to use the competitive model in healthcare to provide the best

value to employers and consumers, then we should compete on price, quality and service, not on how well you can lock out hospitals and other healthcare providers from health insurance networks. Would you want Pepsi and Coke to use their clout with grocery store chains to keep a better tasting, lower price soda pop from being on the shelf for your purchasing and consumption, if you choose?

Just so it's clear, there is no evidence in the record whatsoever, Your Honor, that Mercy did anything to exclude St. Luke's from the networks, unlike ProMedica. There's nothing in the record. In fact, as we'll talk about later, Mercy knew that it needed St. Luke's in the network to make sure that health plan network had adequate coverage in the Lucas County area. And we're going to talk about that.

At the same time, Mercy had such a small share in the southwest Lucas County, that excluding St. Luke's would just benefit ProMedica. So Mercy wasn't being altruistic, they just knew there's no reason to even try to exclude St. Luke's. All the exclusion, when they have the Pepsi-Coke analogy, was done by ProMedica against St. Luke's.

Again, we're not condemning this. In some ways it's vigorous, vigorous competition. But don't come into this court and say, Your Honor, St. Luke's meaningless, insignificant, we'll really didn't compete against them. ProMedica was fixated on St. Luke's and did everything they

could to make sure that they weren't included in health plan networks.

Page 62, December 2008 document from Mr. Wakeman, he writes: The hospital that has added the greatest value to the community in terms of cost outcomes is the one that has lost the most money. That's St. Luke's. The organization has taken the greatest resources from the community, made the best bottom line and performs poorly in terms of cost and outcomes, which is, according to Mr. Wakeman in his deposition, ProMedica. That was St. Luke's views of ProMedica prior to entering this joinder. And this was a mere year, a mere year before agreeing to an exclusive due diligence period with ProMedica.

So it's a fair question for this Court to ask, and even if you didn't ask it, I'm going to answer it. So why did St. Luke's choose ProMedica? St. Luke's, you look through the documents, seems to have some concern for the community, was aware, very aware of what was likely to happen to health plan rates at St. Luke's by joining ProMedica, and so why would they do it?

It's very clear, Your Honor. St. Luke's chose ProMedica. They had other options. [redacted] wanted an exclusive due diligence period, [redacted] wanted an exclusive due diligence period. St. Luke's chose ProMedica, and the question is why, especially when they're fully cognizant of the impact on the

community and employers, employers and employees through higher rates.

And the answer is pretty simple. Joining ProMedica -- or at least one of the answers, sure would make life much easier right now for St. Luke's. Extraordinary rates on health plan contracts, no longer having to compete against a very large dominant system that had a constant bull's eye on St. Luke's back. It makes life easier. It's not easy for St. Luke's, an independent hospital, to compete against someone with that much market power who's fixated on them. And that is indisputable, that it was much easier for St. Luke's, rather than competing against them, which they were doing, to join, become part of the dominant system rather than compete against it.

There's also concern about retaliation. And this is, again, not a theory we're making up. St. Luke's fear that if ProMedica -- St. Luke's fear of retaliation from ProMedica if it affiliated with another partner. Choosing ProMedica would reduce or eliminate significant ProMedica actions that are bound to happen if St. Luke's partners with Mercy or UTMC.

When Mr. Wakeman was asked about that, he just explained, ProMedica had a reputation of being aggressive in the market.

And this is what St. Luke's told their board. If they chose someone else other than ProMedica, ProMedica would

have a scorched earth response, a scorched earth response, if they chose another partner besides ProMedica.

In another colorful document, an e-mail from Mr. Wakeman, the wrath of Alan Brass, former CEO of ProMedica, would come down from us -- from ProMedica. St. Luke's was afraid if they made a decision to go with any other partner, that there'd be significant retaliation from ProMedica. They told the board that, they told their board that when the board was in the process of making a very important decision. So coming in saying we had no choices, no one else wanted us, this was necessary, there was a real fear of retaliation from ProMedica if, in fact, they did, for example, choose UTMC.

Slide 68.

So we have focused a lot this morning on what happens to St. Luke's bargaining power and bargaining leverage now that they're part of a system that has 60 percent market share in general acute care services, 80 percent market share in obstetrics, and now is part of the system that has enjoyed the highest rates in Lucas County.

We don't stop there, Your Honor. There's also a concern founded in the evidence that ProMedica's negotiating leverage already at very phenomenal levels, will increase even further, and we'll explain why.

Bargaining leverage of hospitals versus health plans are determined really through bilateral negotiations. Each

side's leverage is determined by its importance or value to the other side. It's a very large hospital system that has a lot of hospitals nearby, negotiating with a health plan. That health plan really wants them in the network, and if they don't have them in the network, that health plan is going to suffer the consequences from lost business and lost volume. So that hospital system has a lot of leverage.

On the other hand, if the health plan has a lot of members, they can offer a hospital tens of thousands, hundreds of thousands of covered lives, then that health plan has relatively more leverage than other small health plans because a hospital that can't reach an agreement with that health plan is going to lose a significant amount of business because that health plan controls a lot of covered lives.

That is the crux, that is the foundation of how these prices or rates are determined between health plans and hospitals.

ProMedica, an already expensive health system, now becomes even more of a must-have system and can extract even higher rates by adding St. Luke's to its family of hospitals into Lucas County. We'll explain why.

To counter -- slide 69. To counter all the evidence relating to ProMedica's increased dominance and marketing clout, Defendant states that a Mercy-UTMC health plan network would be just fine, that if a health plan had to put together

a network of just Mercy and UTMC, that network would be fine, you could still say no to ProMedica, you wouldn't have to agree to even more exorbitant rates. And so that is a constraint on ProMedica after this acquisition.

But the interesting thing is and the informative thing and the telling thing is, Your Honor, that a network of just Mercy and UTMC has never been offered in Lucas County. It has never been offered.

This is to Mr. Wachsman. To your knowledge, has any payor ever excluded both ProMedica and St. Luke's from their network at the same time? Not to my knowledge.

As a result of this acquisition, health plans now must agree to ProMedica's rates or offer an unprecedented network of just Mercy and UTMC. And so not only has it been offered before, no health plan thinks it's viable, no health plan has said, yeah, we could run with that. We could offer a network of Mercy and UTMC and it would be successful, it would be attractive, it would grow in members. There's nothing in the record, despite all of the affidavits and testimony from health plans that say, yeah, that's a network we can market and be successful.

And because now, if you don't say yes to ProMedica, that's the network you're stuck with, that's the network you have to offer, you're going to be much more willing to accept ProMedica's rate increases and rate demands.

And this is an important -- this is an important fact, Your Honor, that this relates right back to the fact that ProMedica and St. Luke's are very close competitors, especially in that southwest portion of Lucas County.

They're the number one and number two choice based on surveys, based on market shares. And employers know and health plans know that you have to at least offer employers and employees a number one and number two choice, not a hospital like Mercy-UTMC in that area that has significantly smaller share which directly correlates to the preference.

And, again, we are not saying that a UTMC-Mercy health plan network that would deny medical care to Lucas County. No. The question is, is it sufficiently attractive even though it's never been done before, that a health plan could say no to ProMedica's rate demands and still have a successful, attractive growing network.

THE COURT: Well, your view would be that it would be especially true in OB?

MR. REILLY: Especially true, excuse me, Your Honor?

THE COURT: In OB?

MR. REILLY: Yeah, in OB, as we talked about a survey we put up there, that's absolutely true, that, again, the survey that St. Luke's did while they're running the business, it showed for obstetric services, and I'll get you the slide if you want, that ProMedica and St. Luke's hospitals are the

number one, number two and number three choice, meaning St. Luke's, TTH and Flower, for those patients who live there in obstetrics. So for obstetrics, with ProMedica's 80 percent-plus share, it would be particularly true, as well.

And so on slide 70, Your Honor, we've put forth the testimony from health plans, and I would say testimony that is entirely un-rebutted at this point, about how difficult it would be to offer a commercially attractive successful network in Lucas County with just UTMC and Mercy.

Page 70. I will not say the name of the health plan, page 70. We cannot create a viable hospital network in Lucas County for our local clients that consists of only UT and Mercy.

Slide 71, Your Honor, more health plan testimony, un-rebutted. I won't say the name of the health plan. It would be exponentially more difficult to market a network in Lucas County without ProMedica and St. Luke's.

Slide 72, Your Honor. There's a good reason why health plans believe this. And it's very telling that to the extent that UTMC and Mercy would be a viable health plan network, that there's not one example, at least in the last 10 years, by any other health plan who offered it, and there's not one health plan who says, yeah, that would be a network that I could really grow and be successful.

And the reason why is because employers, employers

have testified, slide 72, that that network of just UTMC and Mercy would result in very unhappy employees, and it would not be acceptable. And I'll just read a couple.

First one. A health plan with a network that excluded ProMedica and St. Luke's would not be a viable alternative for our Toledo area employees because it would force many of our employees to go to unfamiliar, inconveniently located providers who are not their first choice for care.

Then another one, the second one, the last one I'll read: A network that included only UTMC and Mercy Hospitals would be untenable to our employees.

Health plans have to be responsive to employees and employers, and this is what employers are testifying to about their employees' preferences.

Slide 73, another health plan. And it's made it very clear that the addition of St. Luke's into the ProMedica network has increased ProMedica's bargaining power. And I'll read from this.

Because of location and the addition of size, when you mention location, what specifically are you referring to?

There's no other hospital in the southwest corner of Toledo community hospital. So everyone in that whole area, it just gives them a lot more leverage because they have -- St. Luke's corridor, the whole southern Maumee area.

Another health plan testimony that is again un-rebutted, slide 74, the joinder would absolutely make it harder, absolutely make it harder to serve its membership in Lucas County without ProMedica.

Slide 76, we expect and it still might occur, that the Defendant may try to characterize this proceeding as nonprofit hospitals versus health plans. And putting aside that St. Luke's document makes it clear that higher rates will stick it to employers and health plans, employers who are worse off, that expense will be borne in part by the employees.

So this isn't an issue about health plans having a less favorable bottom line if rates increase at Lucas County hospitals. In fact, 70 percent of Lucas County employers are self-insured, 70 percent. Health plans negotiate rates, but any cost increases are borne directly by employers and employees. That means higher premiums, higher co-pays, higher out-of-pocket costs for those who are already struggling, these important services. And also higher healthcare costs means residents either have to give up medical care, delay services or even not afford insurance. The cost of the higher rates that will result from this transaction are not borne by the for-profit health plans, they are borne by the employer and the employees, and that is not in dispute.

Slide 77. Again, several local employers have

testified what are the consequences of higher healthcare costs. And just reading the last one, PX2054, many of this employers' employees live paycheck to paycheck and simply do not have the ability to absorb higher healthcare costs. That's what at stake here, Your Honor, in this preliminary proceeding.

Seventy-eight.

I'm not sure if the Defendant is contesting this point, but just in case they are, I'd like to make it. There has been some sentiment in past hospital merger cases that there should be no concern about mergers between two nonprofit hospitals because nonprofit hospitals don't fully exploit their market power. Sure, they could charge more, but they don't. They constrain themselves, they just charge as much as they need to cover cost. And we know that that is not true, and there is overwhelming evidence that in Lucas County, ProMedica is particularly aggressive in seeking the highest rates possible.

It's not just ProMedica. They're very aggressive, but other nonprofit hospitals do this, as well. And Lucas County, going back to the earlier slide we showed on market shares and pricing levels, higher market shares in Lucas County means higher prices. It's that simple. That's what it means.

Seventy-nine.

THE COURT: Well, is there also not the opportunity for shifting of costs? And by that I mean that the wholly-owned entity which offers insurance products in the healthcare industry to have -- be able to reduce its premiums by reducing the costs of the healthcare through its controlling shareholder? Have you followed?

MR. REILLY: Yeah, can I see if I understand your question? If so, I'll answer it.

Is your question does -- are you referring to ProMedica's ownership of Paramount and whether ProMedica will give Paramount favorable rates? If not, I didn't understand --

THE COURT: Yeah -- no, no, absolutely. And I'm not afraid. I said: Is that another issue which affects the market?

MR. REILLY: Absolutely. There's another issue. What happens when ProMedica is negotiating with health plans? And, again this is clear in the documents, is that they of course want to get the highest rates possible, and we have some testimony that makes that crystal clear.

But typically, if a large hospital system does not reach an agreement with a third-party health plan, that hospital loses all that volume. But in many -- but in many ways, if that health plan now, the third-party health plan, becomes less attractive, that benefits their own health plan.

Because if ProMedica, especially after this acquisition where the other health plans have to say yes to ProMedica's rate demands or I'm going to offer an unprecedented, never been offered network. So if they no to ProMedica's health demands, what happens is their network becomes significantly less attractive and people who offer ProMedica hospitals, like Paramount, they become more profitable.

And honestly, some people -- some health plans have testified that they would consider exiting Lucas County if they only have a UTMC-Mercy network because they don't think it's going to work.

THE COURT: I'm sorry, you could have just answered me and said, Judge, give me a few minutes, I'll get to it. It wouldn't offend me.

MR. REILLY: It's okay.

So, Your Honor, we had not -- our primary focus of this investigation is not ProMedica's ownership of Paramount. To be honest with you, in a 13(b) proceeding, with such a very strong presumption and two separate markets, with all the additional testimony and evidence and ordinary course documents that support our theory, we're not going to spend a lot of time on this. But we wanted to flag it and say, yeah, this does complicate and this does make the already incredibly high risk of anticompetitive harm even greater.

Can you go back to 79, please?

And this is slide 79, Your Honor. It's indisputable, every health plan has said, yeah, nonprofit hospitals always seek the highest reimbursement rates possible, consistent across every health plan testimony there.

Go ahead. Eighty.

Their own expert, Ms. Guerin-Calvert, conceded that ProMedica will exercise its full market power.

I'll read the second question: Are you aware of ProMedica ever saying to any health plan, that's too much?

I have never heard of -- there may be an exception, but I do not recall any medium -- small, medium or large hospital ever saying, please, no, it's too much.

Mr. Oostra, CEO of ProMedica, says, we try to maximize our revenue and reduce expenses.

For what purpose?

Well, in the case of our revenue enhancement, we want to make sure that for managed care companies, that we're getting the revenue we're entitled to, you know, in case of expense reduction, we're trying to reduce expenses in order that we can get a decent operating margin so we can continue to exist as an organization.

Then Mr. Oostra was asked, is ProMedica happy with the rates they have with managed care organizations?

No, we would always like more.

So, Your Honor, it's non dispute. If ProMedica, as a

result of its acquisition, has greater negotiating clout with health plans, they will fully exercise it, as they are doing now, as they are doing now, getting extraordinary rates in Lucas County relative to other hospitals, and they will do that in the future. The nonprofit status of ProMedica does not factor into this analysis at all.

Slide 85.

So what is the Defendant's response to this overwhelming evidence of harm? Well, as I understand it, and I'm sure Mr. Marx will say it a lot more eloquently than me, it's either an independent St. Luke's can increase rates to the same levels as ProMedica can, or ProMedica can raise rates higher than an independent St. Luke's can, but they won't.

The second point on the "or" Your Honor is exactly what we're talking about. If ProMedica can raise rates higher than St. Luke's, they will. So let's focus on the first point, an independent St. Luke's can increase rates to the same levels that ProMedica can.

Where is that in the record? No one health plan believes that. St. Luke's documents didn't believe that, ProMedica's documents didn't believe that. There's no evidence in the record that that's the case, that rates were going to go up anyways at St. Luke's, they will go up to the same level independent or with ProMedica. No support in the record for that.

Your Honor, when ProMedica's presenting to potential partners and they're talking about increased payor system leverage, they don't say, join us and you get increased payor system leverage or stay independent and you'll have the same.

When St. Luke's recommended to their board, if we join ProMedica we'll have extraordinary marketing -- managed care clout and access to outstanding contracts. They didn't say, if we stay independent we'll have the exact same rates. The market share pricing chart shows that St. Luke's and ProMedica's leverage is not even close to being the same. So ProMedica, by acquiring St. Luke's, and that was the intent of St. Luke's, and that was the design that ProMedica knew was going to happen, has the ability to charge significantly phenomenally higher rates than St. Luke's ever could, independently.

So to the extent that St. Luke's was seeking modest rate increases by doing a much better job marketing themselves, making it clear that you don't have to be the biggest to be the best, that's great, that's competition. They should sit down with health plans and get those rates. But to even imply, without any support in the record, that an independent St. Luke's could enjoy the exact same rates as self-proclaimed dominant ProMedica, that's not true, Your Honor, and there's no support in the record.

We also made the point that excess capacity in Lucas

County will constrain any ProMedica post-acquisition rate increases. And I guess the question I have, Your Honor, is when does this excess capacity start constraining ProMedica? When? Health plans are already telling Mr. Oostra that they have some of the highest rates in all of Ohio. There's been excess capacity now, excess capacity the last three years under the way they're measuring it. There's no evidence that excess capacity lowered rates.

The rates are very reasonable, that ProMedica, because its excess capacity, can't get significantly higher rates than St. Luke's and UTMC and Mercy. This excess capacity is a tool that is available now to the extent it really could constrain ProMedica, and there's no evidence that excess capacity exists today, that existed the last three years had any impact, any constraining impact on ProMedica's rates, but that's what they want you to rely on, excess capacity will save the day.

They also claim, they being ProMedica -- I guess I should use singular rather than plural -- health plans can steer patients to non-ProMedica hospitals to defeat a price increase. Meaning that you have a tier network, meaning if you go to one hospital like Mercy-UTMC you'd pay a lower rate, if you go to the ProMedica hospitals, you pay a higher rate.

Again, Your Honor, there's no evidence except for Mercy employees, who, Mercy, since they were a hospital,

wanted their employees to go to the hospital, that no employer has relied on and no health plan has relied on steering in the past. It just doesn't happen in Lucas County.

And, again, if these health plans had some incredible constraining tools in their arsenal right now that they could use to get someone like ProMedica to lower their rates, why aren't they using it now? If steering really was going to save the day and in these incredibly highly concentrated markets, in a merger to duopoly in obstetrics and there's some tool that health plans could use to get lower rates today, why aren't they using it? They're not using it because it's not a viable feasible option, and steering is not going to save the day.

Eighty-six.

As I think I mentioned to you during the TRO hearing, it's often the case when we see large systems acquiring independent hospitals, that the claim and the argument that we hear right out of the gate is, we're doing this to improve the quality at the small independent hospital. And then we look at the numbers and we see, yeah, the independent quality numbers look like the independent hospital are not up to par, that they're not high quality, and this big system has a track record of acquiring lower quality hospitals and improving them. That's what we often see.

Here, we see the opposite, Your Honor. We see

St. Luke's, and this is not in dispute, as a very high-quality, very low-cost hospital, top 10 percent of hospitals nationally, great patient satisfaction numbers, great outcome numbers. St. Luke's quality is already and has been and would continue to be as an independent hospital outstanding.

And this chart was put in the board of directors report to St. Luke's talking about an affiliation.

Can you do the arrows?

That St. Luke's where, in that quadrant low cost, high quality, where the quality on the vertical axis is better the higher you are and the lower cost, that side.

Show where Toledo is.

That's Toledo Hospital, and that's Flower Hospital.

This was done, again, presented to the board of directors at St. Luke's when they were considering who to partner with. This wasn't some chart that we made for this proceeding, this wasn't some chart that we made for the merits trial that's ongoing. This chart was in St. Luke's documents and shows St. Luke's compared to the ProMedica hospitals to be significantly higher quality and significantly lower cost.

Eighty-nine.

And rather than St. Luke's saying to their board, our executives and board members, saying, this acquisition is great, it will improve the quality of St. Luke's, the opposite happened. St. Luke's board members and executives were

concerned. They were concerned. They were worried about the acquisition's negative impact on the quality of St. Luke's. Mr. Wakeman acknowledged in his deposition, board members and he himself were concerned that by joining a lower quality health system, St. Luke's quality would decline.

And we share those concerns, Your Honor. This is not an acquisition where, by acquiring a low quality independent hospital, this high-quality system will then increase and improve St. Luke's quality.

Slide 90.

This is a reference of Mr. Oostra writing to Ms. Stelle, Ms. Barbara Stelle, another executive at ProMedica.

Mr. Oostra writes: We see subpar-quality scores when we look at published comparisons. We continue to hear how hard it is to send patients to us. We hear from payors that we are among the most expensive in Ohio.

Again, consistent with what Professor Town found, as well.

And Ms. Stelle writes: Randy, you are absolutely correct.

And so I think if I understand their improved quality claims as talking about better coordinating care across three hospitals, and now four hospitals, by having four hospitals in one geographic market, we will be able to coordinate care

better, and that would be a big benefit in the quality at all the hospitals, I guess the question I'd like this Court to consider is, if owning multiple hospitals in a -- in the same geographic market was really a benefit to the quality scores, why, in all the years that ProMedica has had TTH, has had Flower, and has had Bay Park, why wouldn't they have been able to do all of this coordination of care and create sense of excellence, why aren't ProMedica's current quality scores far and above St. Luke's?

If being able to coordinate care across multiple hospitals was really going to result in higher quality, why haven't we seen it in the three hospitals they've owned in the last several years? Is hospital number four the magic number? Is now by adding St. Luke's and having four hospitals to give quality care in one region is that going to now drastically improve quality, when we have seen no evidence of that.

Slide 91.

So I'm going to go through -- I'm really done with what we call our case in chief, talking about the incredibly high market shares in two separate markets, talking about the presumption, very strong presumption, widely recognized by courts in the merger guidelines, the duopoly in obstetrical services markets, and I've reviewed a portion, but a fairly significant amount of ordinary course documents and testimony from a wide array of market participants that all predict

dramatic 80 price increases.

And so the question remains, what can the Defendant do to rebut this evidence, rebut the presumption and also strengthened presumption by all the evidence that we have put forth in this 13(b) proceeding, where all we have to raise is serious substantial questions to prevail.

So we think there are probably three potential defenses: Entry conditions. Entry must be timely, likely, sufficient to overcome harm; efficiencies, merger-specific efficiencies that outweigh anticompetitive harm. They have to outweigh the anticompetitive harm here. They can't just point to some efficiencies and say, okay, we get to approve our merger under the antitrust laws. And then other defenses, like failing firms.

The most important to take away from this is none of these defenses, or any other defense, rebuts the strong presumption or outweighs the likely harm here.

Can we jump to 96? If we have time I'll go back to entry. I don't see the Defendant pushing entry nearly as much as some of the other arguments. It's pretty clear from the documents, from the testimony that new entry is not occurring in Lucas County. Their own expert claims that Lucas County is over-bedded. That's not the sort of community that you're going to start building new hospitals.

So I'm going to focus more on the efficiencies.

According to the D.C. Circuit in the Heinz case, efficiencies must be extraordinary, extraordinary to overcome high concentration levels. We have high concentration levels here. If the Defendant has any chance of prevailing, they have to point to extraordinary market -- extraordinary efficiencies.

And just do a summary of what our expert's analysis of their efficiencies showed, they're not true cost savings, the efficiencies claimed by ProMedica are not merger specific, they're unsubstantiated, they're speculative, and they're made for litigation.

And a lot of times I'll explain to you what I mean by made for litigation. We suspect that sometimes but we never see evidence of it. We have seen explicit evidence of that in this case, and we'll talk about that.

And before I move on, I want to point out there's been several experts in this case. We presented three, they have one. Our expert, Mr. Gabe Dagen, did a full comprehensive efficiencies analysis and looked at all the claimed efficiencies by ProMedica and reached his conclusions that are exactly what I outlined in those bullets.

Their expert, Ms. Guerin-Calvert, did not do an efficiencies analysis. So we have one expert who did one and one who did not, and these are our conclusions from our expert.

Sorry about that, Your Honor. I'm trying to cut some

slides to get within the time.

THE COURT: That's all right.

MR. REILLY: The efficiency claims are not credible.

Here is what ProMedica has said about the efficiencies either in testimony or in their documents. They're largely guesswork. They represent a first pass at the efficiencies. The efficiencies are based on a gut feeling, that there must be some efficiencies there, there must be. Gut feeling. And estimates are preliminary and subject to further analysis, revision and substantiation.

Those are the type of rigor they brought to these efficiencies analysis. When they talk to this Court about how these efficiencies are so likely and substantial, remember the type of rigor that went into the analysis.

During Mr. Oostra in an investigational hearing, if the claimed efficiencies proved unobtainable, ProMedica would just find other efficiencies. So the list of efficiencies, if they don't pass, if they fall by the wayside, they will find more. Again, not the type of rigor necessary in any merger analysis case, especially one here with such a strong presumption and so much evidence of likely competitive harm.

And this was the one I was referring to, Your Honor. This is an e-mail, internal e-mail of ProMedica. Unfavorable response from Compass Lexicon. Haven't accomplished enough in savings. We will need to be more aggressive with the timeline

of the first three to five years. FTC -- and that's us, Your Honor. FTC discounts value of each year the farther out you go.

They were designed to persuade us, and when it didn't work I think they've been designed to persuade you, and I can tell you how I hope that goes. But they literally have said the FTC, you better discount those less because you can't go further out. That's what we're going to want to see. It wasn't an analysis of what can we truly get and what can we expect, what does the FTC want to see. And if you come up with an analysis and report that the FTC doesn't want to see, go back and change it.

Just to put some context about how extraordinary the efficiencies they must demonstrate, ProMedica has the burden of showing efficiencies must be, Philadelphia National Bank, Supreme Court, where a merger substantially lessens competition, it is not saved because, on some ultimate reckoning of social or economic debits or credits, it may be deemed beneficial.

In another Supreme Court case, Proctor and Gamble, possible economies, and economies there meaning economies of scale, efficiencies cannot be used as a defense to legality because Congress was aware that some mergers that lessen competition may also result in economies but it struck the balance in favor of protecting consumers.

Slide 102.

Another defense that the Defendants may put forth is a failing firm defense. We talked a little bit about this at the TRO hearing. The failing firm defense is very narrow and imposes a very high burden on the Defendant. And, again, Your Honor, the Defendant has the burden of showing that they meet the failing firm defense.

The failing firm has strict limits according to the Ninth Circuit in the case in front of you. And General Dynamics called the failing firm defense, the lesser of two evils. It's a pretty intuitive case, Your Honor.

If you were to let a dominant firm such as ProMedica acquire a hospital and become even more dominant, or you let that hospital exit the market. They're going to close their doors and stop taking patients. In that scenario you let the self-proclaimed dominant firm become more dominant rather than let them close it. That's what the purpose of the failing firm defense is.

Again, Your Honor, it's very important to remember that if they do present a failing firm defense, this has never succeeded in any 13(b) proceeding. They're going to ask you to do something that has never been done, if they're putting forth a failing firm defense.

Slide 103. The Defendant must meet two prongs. There must be a grave possibility of imminent failure, and no

alternative purchasers existed. Those are the two prongs, and ProMedica fails both.

An unfortunate fact for this defense or even the flailing firm defense that we talk about, that on all important financial indicators St. Luke's was trending upwards. In the first eight months of 2010, St. Luke's was trending upwards on growth, on revenue, on capacity utilization, on operating cash flow margin, or EBITDA, and on market share. They're all going up.

We have seen failing firm hospitals, Your Honor. We have accepted this defense in our investigations, and they looked nothing like St. Luke's did. When we see -- when we put these indications up on the graph, we see the death spiral, we see downward trends throughout, and that's when we say, yeah, this failing firm defense is legitimate.

Here, St. Luke's on every important trend was going in the right direction, not only the numbers show that, their documents show that as well, and including the documents of representations made to the board of directors.

And again, St. Luke's failed to pursue less harmful alternatives. They had UTMC, who was very interested in affiliating with St. Luke's, and we'll talk about that more later.

And under the failing firm, there can be no other alternative. St. Luke's said no to UTMC, not the other way

around.

Page 104. Even less likely to succeed is what the courts have termed the weakest defense, flailing firm. This is the Seventh Circuit. Case law is highly skeptical. Financial weakness is probably the weakest ground of all for justifying a merger. It certainly cannot be the primary justification of a merger.

A weak company defense would expand the failing company doctrine, a defense which has strict limits.

And I will tell you what they have to show on the flailing firm if they want you to credit that. The critical question, this is the critical question, and we have the case law from the Eleventh Circuit to show where it came from, and there's other cases, as well.

Can ProMedica show that St. Luke's alleged weakness is so significant that it rebuts the presumption of harm? And that's what University Health says, that a hospital merger case requires a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause the firm's market share to reduce to a level that would undermine the Government's prima facie case. That's what they need. Can they show that St. Luke's market shares were likely to decrease so dramatically, were likely to plummet, that then they can rebut the very strong presumption in this case in two markets, not just one.

So let's see what that means. What do you have to find is a reasonable approximation of what St. Luke's shares would have done absent this transaction.

So right before 2010, Your Honor, that is St. Luke's market share for both general acute care services and obstetrics. As you can tell from 2008, 2009, 2010, they're growing, they're increasing.

Mr. Wakeman, the CEO who was brought in to turn around St. Luke's, who had successfully turned around three other independent hospitals, had put in a plan, we'll talk about this later, and it was working. Their share was growing, their revenue was growing, their occupancy rate was increasing, and this is what it looked like.

In order for the Defendant here to have you credit a failing firm -- flailing firm -- excuse me -- to say, yeah, they can rebut the presumption, here's what has to happen to St. Luke's market shares. For general acute care services, St. Luke's market share has to fall from 11.5 to 2 percent. For obstetrics, it has to fall from 9.3 to 1.3 percent. That's the dramatic fall in market share that they have to convince you will happen in order to rebut the presumption under flailing firm.

And, Your Honor, I promise you I know they think we've gotten millions of pages, documents we probably have. There's not one document that even closely resembles this in

St. Luke's documents. There's no representations made to the board. There is nothing. There's no saying, wow, our market share's grown significantly over the last two years. I hope it doesn't plummet to 1.5. I think our market share will plummet to 1.5 to two percent. There's nothing. It's a made for litigation argument with no support in the documents and no support in the testimony.

Page 108, slide 108.

As I had already referenced, St. Luke's is in the middle of a very successful three-year turnaround plan. They hired Mr. Wakeman, who is affectionately called by us a hospital turnaround expert, in 2008. And Mr. Wakeman immediately saw a huge potential in St. Luke's because a decline in revenue, in itself, in an area where you have growth means opportunity. He created and executed a turnaround plan to improve the hospital's financial performance.

Before Mr. Wakeman got there, St. Luke's, to his knowledge, had never had a one-year strategic plan. He came up with an aggressive three-year turnaround plan with aggressive goals and objectives, and he met those goals and objectives.

So here's his three-year growth plan, increase inpatient net revenue by 10.5 million. He was hoping to do that by 2011. He -- I should say St. Luke's. It was a team

effort, I'm sure. Accomplished April 2009.

Increase outpatient net revenue by 15 million; accomplished April 2009, way ahead of schedule. Increase OP ratio from 40 percent -- outpatient ratio, from 40 percent to 60 percent. Got up to 47 percent by August 2010.

Physician alignment strategy, accomplished.

Ninety percent managed care access, fell short in July 2009. Hit 83 percent, but because Paramount refused to add St. Luke's to his network, it wasn't able to meet that goal.

And then 40 percent inpatient market share in the core service area, they hit 43 percent by 2010. They hit all of their goals on this very aggressive, very ambitious three-year plan.

And the results were very telling and showed significant progress. Net patient revenue in 2007 were 127 million. By 2010, [redacted]. Market share, core service area, 34.1 percent in 2007. 43 percent, 2010. And also had a lot of physicians on the staff.

Mr. Wakeman acknowledged that the three-year plan was successful. St. Luke's had substantial cash and reserves totaling [redacted] on August 31st, 2010, right before the acquisition here. And the market rebound eased a lot of the financial stress on St. Luke's after the 2008 financial crisis. Of course, the 2008 financial crisis didn't just

impact St. Luke's, it impacted a lot of businesses around the country, including St. Luke's, and the rebound in the markets has improved significantly their financial progress.

They're paying bills and debt obligations on time and making necessary capital improvements, and they're attracting a growing number of patients. And they now have a positive operating cash flow margin, or they did right before the joinder. An incredible, dramatic improvement in operating cash flow margin from negative [redacted] in 2009 to positive [redacted] as of August 31st, 2010, right before the joinder. This came in Ms. Hanley's declaration and Mr. Wakeman's deposition and declaration. Dramatic improvement in operating cash flow margin or EBITDA.

Historically high revenues. The point there is where Mr. Wakeman became CEO and you see what has happened to revenues since he came on.

And this is the operating cash flow margin put in graphically. As you can tell in 2007, it was positive. It then went down significantly in 2009, by the end of 2009, and then that is a dramatic improvement in operating cash flow margin, positive [redacted], is it, in 2010 for the first eight months, right before the joinder.

If that trend continued going downward, if revenue was going downward, capacity utilization, market share, all those things, then maybe, maybe ProMedica could put together a

failing firm or even a very, very difficult flailing firm defense. These types of progress, these types of financial improvements, these trends upwards are devastating to both their failing firm and their flailing firm defense.

We've also seen in ProMedica's submission to this Court and also their expert reports about St. Luke's really, really low occupancy rates. It's a sign that they're not significant, they're not unique. It's a sign, ProMedica says, that no one wants to go there. They don't do anything special, and they're not -- they can't fill their beds.

Well, you should look at more recent data. From data from 2008, that might have been true. Actually, it wouldn't have been as bad as they said if they had used the right number of staff beds, but this is what we see is happening in 2010 at the time that the acquisition with ProMedica was consummated.

Mr. Wakeman to the board: In the past three years we went from an organization with declining activity to near capacity.

Mr. Wakeman to the board again: We are at capacity for a number of days throughout the month. In 2010, our concern is burned out staff and lack of beds. Several service lines, and especially obstetrics have experienced great growth in the past two years.

Mr. Wakeman on capacity, we're pretty tight.

Letter to Ohio Department of Health: We're experiencing a surge in obstetrical patients at this time. Our maternity unit has been full with patients laboring, waiting in triage in the family birthing center waiting room because they desire to have their babies born at St. Luke's.

Mr. Oppenlander, St. Luke's former treasurer, noted that the hospital is close to capacity with inpatients. These are all coming at the time Mr. Wakeman implemented their plan. They're saying that St. Luke's has such low capacity utilization, that's a sign that they're failing, that's a sign that they're flailing. That's a sign that no one wants to go there. Not true, Your Honor. Look at the most recent data and documents that tell a very different story.

118.

So what does ProMedica do about the excellent financial progress, the trending upwards of virtually every significant financial number in 2010, the time period right before they stopped being an independent company? Well, I think they're arguing that St. Luke's improvement is the result of remedial and unsustainable decisions to freeze hiring and salaries and limit capital improvements in 2009 and 2010.

That's not true, Your Honor. St. Luke's turnaround was due to sustainable improvements, increasing volume, increasing revenues, sound cost-cutting measures.

Contrary to ProMedica's assertions, St. Luke's actually increased FTEs each year since at least 2007. You can tell from 1122 in 2008 to 1277. And St. Luke's is the only hospital in Lucas County that did not lay off employees. This is not a hospital that's saying let's fire everyone and lay people off because we have to cut costs. They have not laid off employees, and they have grown.

Contrary to ProMedica's assertions, St. Luke's did not freeze capital expenditures in 2009 and 2010. They did not. St. Luke's spent at least 7.5 million on capital expenditures in those years. That's in Mr. Dagen's supplemental declaration.

And contrary to ProMedica's assertions, St. Luke's would not have cut service lines and employees absent this joinder, absent the acquisition. This was considered some period in spring. In August of 2009 it was presented to the board of directors about cutting unprofitable services and it was rejected. It was rejected based on the conclusion that St. Luke's would no longer be able to fulfill its current mission to fully serve the community. It was rejected.

And then even after it was rejected, St. Luke's senior executives presented more options to the board of directors, including remaining independent by talking about cutting services. That option was rejected, it wasn't revisited for at least a year before the joinder was

consummated. It wasn't a viable or threat that they were going to do, especially this was before -- especially in light of the outstanding financial progress and significant financial improvements they made prior to the joinder.

Also, Mr. Dagen's conservative projections show that St. Luke's could have achieved profitability without cutting services and employee levels. Again, that comes from our expert declaration, paragraph 57 through 65.

So remarkably, Your Honor, in 2009, 2010, St. Luke's took several cost-cutting measures, and yet still grew patient volumes and maintained the high levels of quality and patient satisfaction. Rather than saying, Your Honor, don't believe or just ignore the incredible progress that St. Luke's has made in 2010, ignore it or don't give it weight because they cut costs. But that's a sign of good business. That's a sign of an excellent management team. They were able to cut costs in an economic downturn and still produce an excellent, high-quality product with great patient satisfaction. So rather than using it as a source of criticism or taking weight away from evidence, they should be praised for that.

And not surprisingly during an economic downturn, both ProMedica and Mercy were also forced to cut costs and services in response to the 2008 financial downturn. They all did. Nonprofit hospitals across the country did.

I don't think anyone's arguing that ProMedica is

failing or Mercy's failing, yet they did the same thing. ProMedica froze new positions, cut staff, reduced discretionary spending, eliminated services, reduced employee benefits, all because of the economic downturn.

And Mercy -- that's redacted, Your Honor, but they took several that you can see in your slide 122, several cost-cutting measures that look, even for both ProMedica and Mercy, looked like they're even more aggressive cost cutting than St. Luke's did. So don't look at their cost cutting to say I'm going to discount their incredible financial progress, St. Luke's in 2010; everyone cut costs.

There's also been a lot of paper written about St. Luke's pension fund. ProMedica's expert called it unfunded in the first declaration and then it was changed to under-funded. And it was under-funded, Your Honor; it is not unfunded.

The facts.

In 2009, St. Luke's pension fund was 71 percent funded, on par with such failing companies such as ExxonMobil, CBS, Disney, and Motorola. A lot of companies, Your Honor, of incredible size, of financial reserves were facing similar pension issues because of the equities market's decline. It had nothing to do with St. Luke's. When the equity markets go down it becomes less funded, when they go up it becomes more funded.

And sure enough, in 2010, St. Luke's pension fund was 76 percent funded.

And there's no risk. I want to make sure this is clear. There's no risk that retirees from St. Luke's aren't getting their pension money. There's no risk at all. St. Luke's has sufficient funds to pay this for decades. 86 million in the fund that pays out about 3 million a year on average. That is not -- they are not going to run out of pension money for decades, Your Honor.

They also made a change to their pension fund, switched from a defined benefit plan to a defined contribution plan, which will minimize pension swings and equity market swings and cycles by doing the switch. So the pension issue in terms of being fully funded/not being funded should just decrease over time.

In terms of St. Luke's bond rating, there's been a lot of information put out about this as well. ProMedica in their filings calls the Baa credit rating just above junk bond status. We call it what Moody's calls it, Baa credit rating is investment grade. There's actually another notch that if St. Luke's went down, there would still be investment grade. St. Luke's credit rating is investment grade according to the official Moody's definition.

28 percent of Moody's hospital and this comes from Mr. Brick, are in this category. Similarly rated hospitals

had plenty of access to the debt markets. They borrowed $2.6 billion from January 2010 to January 2011. And St. Luke's is better positioned in many categories, low debt load, being that their cash to debt ratio was, by many fold, better than the average hospital for Baa rating.

And this total bond size was, compared to their cash reserves, was fairly low. They had the ability at any time and they were contemplating this, paying off the bond in its entirety. You see in St. Luke's documents contemplating this because they had large cash reserves and a small bond debt, and they could have paid it off.

In terms of the bond rating, there are several factors. And, again, Mr. Brick offers an expert opinion on this, that could change your rating up, continue growth and stability of inpatient and outpatient volume trends, significantly improved and sustainable operating performance for multiple years, improve market share, strengthening of debt coverage measures and liquidity balance. All of these are trends up that would likely improve, not result in further downgrades to St. Luke's bond rating.

It's really important for this Court to remember, St. Luke's has never, never been late or failed to make a payment on its bonds. They are never late. And Mr. Wakeman called the bond payment the equivalent of a car payment. Only in this court in this proceeding has this bond rating and bond

taken on larger than life measures. It was a car payment. According to Mr. Wakeman prior to this proceeding starting and getting in front of you.

So I'm not, unfortunately, going to end, but I'm going to -- last word for now on St. Luke's financial progress and the great work that they have done, especially in the first eight months of 2010. This is Mr. Wakeman's last words to the board on behalf of the independent St. Luke's. In many ways, Your Honor, this is frozen in time. There will never be -- I shouldn't say never. An independent CEO no longer exists at St. Luke's, they're part of ProMedica. This is Mr. Wakeman's last words to the board of directors, where, of course, Mr. Wakeman always provides accurate information to the board. He said so, and you would not expect otherwise.

Inpatient up 7.5 percent, outpatient up 6.1 percent, activity is running hot all month. While we still have capacity for outpatient, especially in the offsite centers, inpatient capacity is limited, except for weekends. The high activity produced a positive operating margin of [redacted] in gross revenue. That's not impressive, but it's better than a loss. The positive margin confirms that we can run in the black if activity stays high. After much work, we have built our volume up to a point where we can produce an operating margin and keep our variable expenses under control.

Continues, same memo to the board of directors. The

entire St. Luke's family has much to be proud of with the accomplishments in the past three years. We went from an organization with declining activity to near capacity. Our leadership status in quality, service and low cost stayed firmly in place. In the past six months, our financial performance has improved significantly. Has improved significantly. The volume increase and awareness of expense control were key.

Those are the words of Mr. Wakeman to the board of directors right before the joinder in a matter, in a preliminary matter where the Defendant is pushing failing and flailing firm and making St. Luke's financial situation, trying to make it center of this analysis.

Slide 132.

Okay. In their pretrial brief, Defendants claim that there have been a string of hospital merger cases in the past that both DOJ and FTC lost that also had a very strong presumption. I'm not going to contest that the DOJ and FTC lost hospital cases in the past, Your Honor. That I'll stipulate to. But they're absolutely wrong. It is false that these hospitals, that the 13(b) preliminary relief was denied with a strong presumption in place. It's not true, and I'll tell you why.

The combined market shares in these cases are substantially smaller than this case, and the Government

didn't meet its burden. I mean, they cited some of these cases because we alleged a narrower geographic market, that the Court did not find for that. And there was no presumption. There's one case which I'm going to talk about where the Government had a presumption, a hospital merger case, and was not denied relief. Every other case where the presumption was in place, they won.

And, again, it's not in dispute that there is a presumption at least in general acute care market in this case, not in dispute.

So Mercy, yeah, DOJ alleged a combined share of 86 percent, but the Court held the Government had not proven the relevant geographic market, so market share was only 10 percent. There was no presumption in Mercy. The combined market share was 10 percent. Not relevant to this case, Your Honor.

FTC versus Tenet. Government alleged market shares based on 84 percent combined. Court held that the Government failed to prove geographic market, which the share was inaccurate. And if we didn't prove geographic market in this case, Your Honor, if we didn't put forth evidence to let you determine what it was, then we wouldn't have a presumption. But of course we did.

FTC versus Freeman. FTC alleged post-merger HHI of 3088, but the Court held that geographic market was not

proven, and the post-merger HHI was 1322, compared to the HHIs in this case, Your Honor, and the combined shares of 21-24 percent.

Again, as I point out, here the Defendant concedes that the Plaintiffs have established a presumption of competitive harm based on high market concentration levels. And the reason for this, again, Your Honor, to repeat myself, is simple. We have proven geographic market, we have met our burden in geographic market, if we have presented evidence that will lead this Court to believe that ProMedica could acquire Mercy, all the Mercy Hospitals in Lucas County, UTMC and St. Luke's and raise prices. And if we have shown that and if we have put forth all the evidence to prove this, then we're entitled to the presumption.

And, again, Your Honor, I'm not aware of one piece of evidence in this matter that contradicts the geographic market here. I'm not. The fact that ProMedica could acquire Mercy and UTMC and St. Luke's and not raise prices by five to 10 percent, there's no evidence saying otherwise.

There is one exception -- I'm sorry, let me talk about Evanston. This is the last litigated hospital case. The post-merger HHI was just over 3000, and because it was a consummated deal, prices had already increased by 20 percent. So that was the last litigated hospital case, significantly less concentrated market, significant price increases.

The presumption matters, Your Honor, and we have not lost cases, except Butterworth, where there was a presumption in place.

So Butterworth is a case in the Sixth Circuit where the Defendant could point to and say there was a presumption there, and yet the FTC was denied preliminary relief. But I want to inform this Court the reasons that the Butterworth Court did this. The Court credited arguments that a nonprofit hospital was not likely to raise prices, in part because the local community board would not allow it. And the Court also relied on the hospital's commitment to freeze prices for three years and limit price increases for four years after that.

In terms of the first point, there was a sentiment that nonprofit hospitals don't exercise market power, that they're not going to charge as much as they can. The judge and the Court found there that that's what the evidence said. Here, Your Honor, it's not even in dispute. Mr. Oostra's testimony, health plan testimony, ProMedica's own experts' testimony. ProMedica, like other nonprofit hospitals, will fully exercise market power if they have it. The Court in Butterworth found differently. The evidence must have been different.

And you're not hearing anything in this court, nor will you, about pricing freezes or pricing caps. And the reason why the Defendants in Butterworth did that is because

they were saying we're confident that prices won't go up, prices won't go up, so we will agree to a pricing freeze, a pricing cap.

You're not going to hear that from ProMedica. ProMedica's telling this Court, yeah, prices are going to go up at St. Luke's. Of course they are. Totally different from Butterworth. We're talking about how high prices are going up.

THE COURT: What community was Butterworth in?

MR. REILLY: Grand Rapids, Michigan.

THE COURT: And it appears that there was a community board which at least controlled price increases.

MR. REILLY: Yeah. It's actually a very good -- even if it wasn't a good question, I'd tell you it was a very good question, Your Honor.

THE COURT: Thank you very much.

MR. REILLY: There was evidence in that case that the local community board was involved, seeing some of the rate increases, the rate suggestions. Also, there was a sentiment that because the local community board lives in the community, a CEO is in the community, they wouldn't want hospital rates to increase because it'd hurt their businesses.

And your question reminded me of another point. For ProMedica, when they negotiated rates with health plans, those rate negotiations, possible contracts, draft contracts never

go to the ProMedica board.

Mr. Oostra testified that he rarely sees them. Only in the rare exception. It doesn't go to the board. There's not this ProMedica board looking at, well, 40 percent price increases, give that a haircut. That's too much. Never. If they have evidence of that, ask them to see it because we haven't seen it. The ProMedica board does not offer a constraint or a limit of how much ProMedica would charge.

THE COURT: Well, so this local community board references to the Butterworth's board, not an outside communal board?

MR. REILLY: That's right.

THE COURT: Thank you.

MR. REILLY: Slide 135.

Let me mention another point that was in their pretrial brief. Since it's a fairly new point and we haven't responded to yet, we thought we would.

In their pretrial brief, ProMedica mentions the recent [redacted] negotiations as a sign that they will be reasonable, they will be fair, they won't raise rates too much. And that's what they're putting forth.

Actually, we have a strong disagreement with that conclusion. In fact, the [redacted] negotiations affirm why the proposed court order is necessary. Because ProMedica entered into a voluntary hold separate letter with us, [redacted] had

leverage and had a tool to constrain ProMedica that it wouldn't otherwise have. Under that letter, [redacted] could continue St. Luke's rates indefinitely. They had that option because of the voluntary hold separate letter.

The important constraint on dramatic price increases will evaporate without an order from this Court. That changes the leverage.

And also Your Honor, this comes from Hospital Corp of America, Judge Posner.

For ProMedica to point to recent results from the [redacted] negotiations and say, ah, look, we're fair and reasonable, they have two antitrust actions filed against them, one here and one in D.C.; they know we're watching.

And Judge Posner says it beautifully: Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.

I wouldn't put a very high probability that they're going to make these exorbitant demands from [redacted] right before we're seeing you or seeing Judge Chappell in D.C., Your Honor.

Slide 136.

There has been some mention in this case, especially by the Defendant, that St. Luke's needed to join with ProMedica because of healthcare reform. Healthcare reform is not a blank check for the self-proclaimed dominant firm to

become even more dominant, for the self-proclaimed dominant firm to acquire a very close significant vigorous competitor. It's not -- healthcare reform, depends on who you talk to. Everyone has a different opinion what it will look like, when it will be enacted, what the Courts will do with it. It cannot be at this stage saying healthcare reform, we get to have a merger to do all obstetrics. Healthcare reform, we get to have a 60 percent market share in general acute care services.

And that being said, it is indisputable that St. Luke's is a high-quality, low-cost provider. And as much as there are different opinions from everyone, I think there's pretty universal feeling that a high-quality, low-cost provider will do very well under proposed healthcare reform as incentives are put in place to have outcomes at a low cost.

And St. Luke's agreed. St. Luke's wrote: Is uniquely positioned for smooth transition to expected healthcare reform. The hospital already focuses on quality and cost; key components of reform. They thought they were in a very good situation to thrive under this new motto or do better than other hospitals, and I've seen nothing to change that, because, again, they are a high-quality, low-cost.

137.

So I'm going to summarize, of course, my view of what ProMedica has to ask this Court to accept in order to prevail,

and I respectfully suggest that they have to ask you to make history. This Court would have to approve uncontested double-digit rate increases in two relevant markets:

Allow HHI increases in the thousands;

Endorse a merger to duopoly for the first time ever in the 13(b) context, or in a merits trial, for that matter;

Sanction higher prices on the novel theory that current prices are too low. Your Honor, current prices are too low. ProMedica will decide what a fair rate is, not competition, ProMedica. And this is a novel theory, so we are anxious to get their brief and see what's the support for this. We didn't know of any case.

And the only case they cited was Long Island Jewish Memorial Hospital. I remember saying, that court didn't say prices are going up dramatically after an acquisition, but they're still fair, but they're still competitive. They didn't say that. In Long Island Jewish Memorial the Court said there's no evidence that prices will increase. So they can't cite Long Island Jewish Memorial for this novel theory.

Ask them. I don't know. Cite a case where the court said this merger will result in significantly higher prices, but that's okay because the prices are still fair. There are none. They're asking you to adopt a novel theory that has not been adopted by any other court on a merits trial, never mind a 13(b) preliminary setting.

Credit, for the first time in 13(b) history, a failing firm defense. Never been done. They're asking you to do that.

Deny preliminary relief on the equities. For the first time ever in 13(b), despite FTC showing of likelihood of success. If we show serious financial questions, every time the FTC has done that, they have always won on the equities. And they're asking you with all these equities thrown in, to deny relief, even though we raise serious substantial questions.

Accept an efficiencies defense to an otherwise clearly anticompetitive merger. Never been done. They're going to talk a lot about efficiencies, talk about how they offset the harm here. They're going to ask you to make history in that, as well, Your Honor. Absent a lot of history being made, I respectfully suggest to this Court that based on the presumption, based on the standard for 13(b), based on the incredible number of ordinary course documents that support our theory, out of the mouths of ProMedica and St. Luke's when they didn't know we were watching and didn't know you were watching, based on testimony from every health plan where they can't point to one health plan that says, this is good for the community, this is good for healthcare, based on the numerous, numerous employers who are concerned about this transaction and expressed concern and expressed how higher healthcare

costs affect them, based on testimony from third-party hospitals, based on five expert reports submitted to this Court, that has been, and I would like to say long before we got to that point, an incredible amount of evidence, combined with the presumption to have us raise serious substantial questions. And if we have done that, we are entitled to preliminary relief.

I'm going to talk about the preliminary relief.

How much time do I have?

THE COURT: Five.

MR. REILLY: Thank you, Your Honor.

THE COURT: Six, actually.

MR. REILLY: Slide 138.

I expect, I hope we'll be talking more about our proposed order tomorrow. I just want to make a few points now in my remaining six minutes, assuming it's not down to five.

The relief is necessary to maintain the status quo. We already talked about that. And the objectives of the proposed order are pretty clear, prevent dramatic and immediate price increases;

Preserve St. Luke's service lines and staffing levels, all of which ProMedica is contemplating cutting;

And ensure the availability of effective relief, if warranted, after the merits trial.

Those are the goals of the proposed order. And let's

be very clear. Absent preliminary relief, rates at St. Luke's will increase dramatically. After the TRO hearing, ProMedica asked us whether we'd be willing to modify one aspect of the voluntary hold separate letter. It wasn't, hey, we just want to make sure this voluntary hold separate letter allows us to make more investment in St. Luke's. We want to make sure that we can get more efficiencies. The one request they had was, we want to be able to notify health plans immediately, immediately, that if you rule against us, that they can renegotiate significantly higher rates from health plans. That was their one request that they wanted. They plan to raise rates immediately the minute that the voluntary hold separate letter doesn't apply or there's no order from this Court.

Again, the Commission finds that divestiture is warranted after the merits trial, the public is entitled to full effective remedy. That means reestablishing St. Luke's as a full-service community, with service lines and employees in place. ProMedica's contemplating consolidating service lines from St. Luke's. The Commission has a right and the public has a right after the merits trial to spin off or potentially divest the exact same hospital that was acquired through the joinder in terms of service lines, staffing levels. We don't want, it's not in the public's interest to have service lines consolidated and moved from St. Luke's to

Flower, Bay Park, TTH.

ProMedica argues that there's no relief necessary from this Court because a joinder agreement protects all the services and protects St. Luke's. Your Honor, the joinder agreement protects a handful of services. We're not exactly sure if, in fact, they did change the joinder agreement and start consolidating and moving services out of St. Luke's, who would enforce it? Would it be the St. Luke's hospital now owned by ProMedica would sue ProMedica? A potential lawsuit by a controlled entity against another entity cannot be a substitute for effective enforcement of the antitrust laws.

To the extent that ProMedica does intend to keep St. Luke's service lines exactly the same, does intend to keep St. Luke's staffing levels the same, then this order has no burden on them. If they're not going to do what -- if they weren't going to do anyways what we're asking for in the order, then enter the order and hopefully, we won't have to bother you again because they're going to keep the service lines and staffing levels intact. They've never said they're not going to jack up rates to health plans or employers at St. Luke's.

And let's be clear. ProMedica is considering consolidating moving service lines. Mr. Oostra said recently that they're considering consolidating service lines. Navigant is studying where service lines should be moved from

one hospital to the other. This isn't some theory that we're coming up with. They're actively and continuing looking at this.

So how does the proposed order relate to the voluntary hold separate order? The overriding objectives are the same. As we said, maintain the same service lines, staffing levels, same high-quality, low-cost model that made St. Luke's an invaluable asset to the community. Maintain the status quo while the merits trial runs its very quick pace.

But the letter agreement was also voluntary, had little specificity and didn't have independent oversight. Those are some things we're talking about and are asking for in the proposed order.

The hold separate proposed order that we put before this Court is very similar to dozens of hold separate agreements that companies have entered into with the FTC. They all appoint a monitor. A monitor's goal is to monitor, not to run the business. Not surprisingly in their pretrial brief, Defendant talked about all these extraordinary powers that the monitor has. Those are very -- those are extraordinary, rarely-used powers that in case the business starts going down, they have to be able to do something.

And, in fact, so rarely used, that in the last 30 years, even though those types of powers in terms of cutting salaries by a monitor have been in hold separate agreements,

never been used. So by pointing to something that has virtually a tiny, tiny little probability of being used by a hold separate monitor and saying, look at this, it is a rare, rare, rare never used case that the monitor is going to use the powers in there.

And, again, there's a 13(b) case in the Central District of California where the FTC has asked for the Court to appoint a director to manage the held-separate businesses. We are not seeking a director here, Your Honor. We are not, for the very simple reason St. Luke's management team under Mr. Wakeman has implemented a successful dramatic three-year turnaround plan. All their numbers are improving. They said they've made significant financial progress. We want Mr. Wakeman and St. Luke's to run St. Luke's during the interim period of the order. That's -- we don't need a director to run it. They already have a great management team in place.

One last point. In their pretrial brief they said that the proposed order by you would limit ProMedica's investment in St. Luke's. Well, they already signed a joinder agreement that said they would invest 30 million. So in some ways they're saying the joinder agreement means that it's so ironclad you don't need an order, oh, on the other hand, we did commit to spending 30 million in the joinder agreement, but that's negotiable. It's in the joinder agreement.

There's nothing in our proposed order that limits ProMedica's ability to make investments in St. Luke's.

And notably, they didn't cite anything in our proposed order. They made a general statement. They want us to put -- you want us to put explicitly ProMedica can invest as much as it wants to in St. Luke's or invest what they've already committed, we'll put that in there.

They also claim that the proposed order prohibits St. Luke's inclusion in ProMedica Healthcare Obligated Group. Again, Your Honor, nowhere in the order. Not even a fair reading of the order implies that. If it would help, we would make that perfectly clear in the order that you think you are contemplating issuing, to make that perfectly clear. Those are things they're talking about they may do. The order was not designed nor does the clear language of the order say that's got to happen.

Nor does it impede coordination of care, Your Honor. We have an explicit statement in there saying the types of things that hospitals in the community do to better coordinate care, to form accountable care organizations, that can all happen, as well. That's all free to happen. The order does not prohibit that.

Again, Your Honor, I just want to, on my last point, say that the order is not for some three, four-year period. It is literally to maintain the status quo during the merits

trial. The ALJ, administrative law judge, Judge Chappell, will issue his opinion by the end of the year. We fully expect if we don't meet our burden and prevail on the merits trial, they will be coming running to you to say we have to revise this order, we have to eliminate this order, we won, we being ProMedica, in the merits trial, let's revisit this.

So we're not asking you to do something that's going to last for years. It's a short period of time while the Commission does its job in the first instance and conducts the merit trial to determine the merits of this case.

That's all I have, Your Honor, unless you have any questions.

THE COURT: I presume you will discuss this tomorrow, perhaps, but if one assumes for purposes of discussion only, that the Court does not issue any order that the joinder proceeds apace, that the order of the ALJ then goes in early 2012 to the Commission, and from the Commission to the Sixth Circuit, we're talking a minimum of two years, the question I -- in that scenario, what do you see as the issues facing the unwinding of the transaction should the FTC ultimately prevail in the Sixth Circuit?

MR. REILLY: Uh-huh.

Would you like me to address that now or tomorrow, Your Honor?

THE COURT: Whichever you prefer.

MR. REILLY: Yeah, I'll just address it.

It would be significantly more challenging if -- and I really do hope as a hypothetical question, if you didn't issue your order and as is played out on the trial of the merits in front of the ALJ, appeal of the Commission and the Sixth Circuit, you're right, a significant amount of time will go by. And I think it's -- with certainty, the rates that employers are paying for healthcare at Lucas County would increase. We also think that it's very likely that service lines would be moved from St. Luke's. At that point it's really, we prevail on the merits trial, appeal to the Commission, the Commission decides what is effective relief.

I mentioned the Evanston case, because so much time had passed and there wasn't preliminary relief, a spinoff wasn't possible. There's too much integration. There's all this stuff going on. And that's the exact purpose of 13(b), Your Honor, is that it maintains effective relief if, in fact, we do prevail on the merits trial, if, in fact, we prevail in front of the Commission, and the Sixth Circuit, that's a lot of work to prove our case and go that far and then not have effective relief.

THE COURT: Thank you.

May I see you and David?

(Discussion held off the record.)

Ladies and gentlemen, we'll now break until 1:30. I

would intend to start very promptly so that we can vacate the premises for the benefit of the staff of this courthouse before 5:00 o'clock.

Thank you. Enjoy your lunch hour.

(A recess was taken from 12:22 p.m. to 1:28 p.m., after which the following proceedings were had:)

THE COURT: Thank you, ladies and gentlemen. Please be seated.

Ready, Mr. Marx?

MR. MARX: I am, Your Honor. Thank you very much.

Two preliminary matters, if I might?

THE COURT: Of course.

MR. MARX: I think we have an agreed statement for you if -- between the parties to -- relating to the documents that the Government was referring to this morning in terms of their confidentiality. That's the handwritten version that we've just provided to you. I apologize for the fact that we couldn't get it typed over lunchtime, but . . .

THE COURT: Very clear.

Let me read the order that I am putting in place now at 1:29. As I indicated this morning and I now incorporate it in this offer, to the extent that any confidential documents subject to the protective orders entered in this case were discussed in this morning session or may accidentally be discussed in this or tomorrow morning's session, the contents

of such documents shall not be discussed, disclosed or used outside the confines of this courtroom.

It is so ordered.

MR. MARX: Thank you, Your Honor.

Second point, I put a notebook just to the right of Cathy for Your Honor that has the slides to which we'll be referring this afternoon. I think they're organized like one through six today. So, for example, behind tab number 1 will be the few slides that I will be referring to, and as we rotate through this afternoon our presentation, we'll let you know where to find the other ones.

I also left a box, which you don't have to worry about this afternoon, to the right of Cathy on the chair. Those represent the three notebooks of Defendant's exhibits in connection with the preliminary injunction hearing, but you don't have to worry about those today, and we'll be happy to take those upstairs for you afterwards if you like.

THE COURT: Thank you.

MS. HANCOCK: Thank you, Your Honor. Before I begin the Defendant's presentation this afternoon, I would like to introduce some of the individuals who are here today representing ProMedica and St. Luke's.

First, Mr. Larry Peterson, who's the chairman of the board of ProMedica Health System, Your Honor. You may know some of these gentlemen and ladies.

Jamie Black, who is the chairman of the board of St. Luke's. Randy Oostra, who's the chief executive officer and president of ProMedica Health System. Jeff Kuhn, who's the chief legal officer of ProMedica. Marshall Bennett who -- from Marshall & Melhorn, for whom we should have entered an appearance today on behalf of ProMedica this morning, but he was sort of behind us, and big as he is, it's my fault, I forgot to introduce him.

And Priya Bathija, the associate general counsel of ProMedica Health System is also here.

Your Honor, this joinder between ProMedica and St. Luke's couldn't have happened five years ago, and it probably couldn't even have happened three years ago. The simple truth is that the previous leadership of both institutions wouldn't have and couldn't have made this joinder transaction happen. Back then, St. Luke's, which has always been fiercely protective of its independence, probably wouldn't even have sat down with ProMedica to discuss a transaction like this one.

Why not? Well, we saw a couple of slides I think that provided a pretty good indication of why not this morning. You saw the slide where -- that indicated that ProMedica had a reputation of being aggressive in the market. You saw another slide that discussed the wrath of Alan Brass would have come down on us from ProMedica. Those documents I

think describe others' perception of ProMedica Health System and ProMedica's reputation in the marketplace.

In fact, the first two options that St. Luke's considered for partners were Mercy and the University of Toledo Medical Center.

Now, Mercy lost interest in St. Luke's because of St. Luke's troubled financial situation and a consultant's assessment that limited purpose joint ventures between St. Luke's and Mercy wouldn't be financially viable. St. Luke's and UTMC danced around for a long time, but they never got very far, far enough in their discussions to pursue any meaningful due diligence. And that was one, one, but not the only reason that St. Luke's concluded that the fit with UTMC didn't seem right.

But, Your Honor, people and circumstances change. And when the discussions between Mercy and UTMC stalled, St. Luke's began to examine more closely the potential for an affiliation with ProMedica.

As an organization, ProMedica's personality changed when Randy Oostra became ProMedica's chief executive officer. And perhaps surprisingly to St. Luke's, when Dan Wakeman and Randy and their boards began to talk about a transaction, ProMedica and St. Luke's found they had more reasons to join than they might otherwise have expected. And we'll talk about those reasons over the course of the next couple of days.

Now, first, I want to address a couple of issues that Mr. Reilly raised this morning directly. This won't be the only time we address these issues, but I want to address a couple before we get too far along.

First, I want to affirmatively and unqualifiedly state that no matter what Dan Wakeman may have thought or hoped about how a joinder with ProMedica might affect St. Luke's ability to increase its reimbursement from commercial payors, and when I see his statements and I read them, the terms "irrational exuberance" come to mind.

ProMedica did not pursue this joinder with the purpose or intent of raising the rates it charges payors to treat their commercially insured members or employees. Let's be clear about something. High rates do not violate the antitrust laws. High prices are not per se unlawful. Never have been, never will be.

The fact that prices go up doesn't violate the antitrust laws either. The only time that higher prices violate the antitrust laws is when they reach supra competitive levels, when they achieve a level above a competitive price. But high prices in and of themselves aren't anticompetitive. And to the extent that ProMedica charges higher prices than other providers in Toledo, there's nothing wrong with that. It's not inherently unlawful.

THE COURT: It's usually just the reverse, isn't it?

MR. MARX: Yes, it is usually just the reverse. But as a practical matter, there's no evidence in this case either that the prices that ProMedica's charging are anticompetitive.

The FTC's economist, I asked him, do you have any evidence that the prices that ProMedica's charging in the marketplace are anticompetitive? No. Do you have any evidence that ProMedica has exercised whatever bargaining leverage or market power or whatever it is that you want to call it, do you have any evidence that ProMedica has exercised its size to achieve supra competitive prices, prices above the competitive market level?

Answer: No.

So whether or not ProMedica charges high prices now really is irrelevant. The issue is whether or not as a result of this transaction, ProMedica will be able to charge commercially -- commercial insurers prices above the competitive level, supra competitive prices.

In the Government's world, in the Government's world, they say if there's a merger and prices go up, we have an antitrust violation. That's simply not the law, and we'll take that on a little bit more as we proceed over the course of the next couple of days.

But there's not a shred of evidence to suggest that ProMedica will change its approach to managed care contracting for itself or for St. Luke's now that St. Luke's has joined

ProMedica Health System. Nor is there any evidence to support the notion that ProMedica could or would try to charge payors the rate for St. Luke's that ProMedica charges for its other Toledo Hospitals. There is no basis to suggest that ProMedica's prices for St. Luke's will go up by the 71 percent that Plaintiff's economist has suggested. There's simply no factual basis for it.

Now, we've heard a lot, we've heard a lot about Mr. Wakeman's statements and representations to the St. Luke's board. I probably missed it when Mr. Reilly mentioned it this morning in his presentation, but I certainly don't recall any citations to -- this morning to Mr. Wakeman's belated recognition, his "aha moment," if you will, that St. Luke's rates with its two largest commercial payors, MMO and Anthem, weren't covering St. Luke's cost of delivering care to those patients. It was that realization, and it came to Mr. Wakeman late, it came to him after all of his other turnaround tricks, if you will -- and I don't use that term pejoratively, but all of the steps that he had taken, and Ms. Carletti's going to talk some more about this in a little bit, he pursued them and there was still a problem. St. Luke's was still losing money. Couldn't figure out why. And the realization that he came to was that the rates that St. Luke's was charging MMO and Anthem weren't sufficient to cover the cost of care that they were delivering to their patients.

And when Mr. Wakeman realized that and he went to MMO and he went to Anthem and said we've got to renegotiate these rates because we're losing money hand over fist, and the trend is going down, not up, MMO and Anthem refused to renegotiate. They've said, we've got a contract, we're not going to renegotiate now.

And it was that -- at that point when it became clear to Mr. Wakeman and to the board at St. Luke's that they had to abandon any thought of remaining independent, and that's ultimately what led them to the joinder with ProMedica.

All of the evidence that's been adduced so far in this case shows that ProMedica will use the same methodology to negotiate with payors for St. Luke's that it uses with other -- for all of its hospitals.

And it's true that a recently negotiated contract between St. Luke's and MMO which ProMedica negotiated does provide for a rate increase for St. Luke's to be implemented over the four-year term of the contract. And I want to emphasize the four-year term of the contract.

But even after the rate increases have been implemented, MMO will still be paying St. Luke's less than Paramount, ProMedica's insurer, will be paying St. Luke's for St. Luke's participation in the Paramount network.

Now, the FTC suggests, not surprised, the FTC suggests that ProMedica has manipulated those negotiations

with MMO because we're meeting with you and because the FTC has filed this administrative complaint.

I said there was a four-year contract, and it is a four-year contract. And the reality is that the rates that ProMedica has negotiated with MMO that cover the course of that four-year contract are going to be in existence long after you've resolved this case for us and long after the FTC, and if we have to, the Sixth Circuit, has resolved it for us, as well. This is a four-year contract. We're stuck with these rates for four years. So if we manipulated them for purposes of producing evidence in these two cases, it's going to have a financial impact on us for four years. This was a hard-bargained contract, it wasn't manipulated.

Let me focus on another point quickly before I cede the day as to others. I want to talk about the number of commercially insured patients that have the potential to be affected by this joinder. The FTC focuses on market shares. At least today they mentioned a couple of times the number of patients who might be affected by this transaction. Now, the Plaintiffs allege that this joinder is going to substantially harm competition in the markets for general acute care inpatient hospital services and inpatient obstetrical services sold to commercial health plans.

Remarkably, there was hardly any mention of Mercy, which, as you know, has three hospitals, offers a wide range

of services from different geographic locations proximately located to ProMedica, or UTMC as a competitor, as competitors in this marketplace.

Listening to the FTC, one might think that the market for general acute care services, not just obstetrical services, is a duopoly. It isn't. General acute care services has four competitors. There will be three. But let me talk about this duopoly point because the FTC has made that point a couple of times as it relates to obstetrical services.

As a practical matter, the only obstetrical services that St. Luke's presently provides are basic OB services. St. Luke's handles uncomplicated deliveries. High-risk deliveries only occur at Mercy and at ProMedica. There has been a duopoly in this marketplace for high risk deliveries since time out of mind. And there is no suggestion, and I didn't hear the FTC say it this morning, that there has been any exercise of market power by either ProMedica or St. Luke's -- I'm sorry, ProMedica or Mercy with respect to those high risk deliveries.

So to the extent that this transaction, this joinder may result in a duopoly for inpatient obstetrical services for the low risk deliveries, one needn't be concerned about the potential for the duopoly to cause higher price. We've had a duopoly. There's no evidence that -- there's no evidence that there's been a problem here.

Now, let me talk for a minute about how many patients are actually going to be affected by this transaction. The number of commercially-insured patients that St. Luke's treats who are in the relevant product market in 2009 was 3790 patients, or about 10 admissions a day. Ten admissions a day.

Of those 10, on average, Aetna insured one, Anthem insured two, Frontpath insured one, MMO insured four. We've got a new contract with them that's in effect until 2014. I'm not as worried about them anymore. United insured one, Cigna less than one, and Paramount also less than one.

And just so we're clear, only one out of those 10 commercially-insured admissions to St. Luke's per day was an expected mother admitted to deliver a healthy baby.

THE COURT: Did this come from one of these?

MR. MARX: The next slide I think shows -- did this --

THE COURT: Are these -- is what you have on the screen in here?

MR. MARX: Yes, behind tab 1, Your Honor.

THE COURT: Thank you very much.

MR. MARX: Hopefully in the order.

THE COURT: I'm going to give this to Cathy, because I have it very nicely on the screen.

MR. MARX: There you go.

THE COURT: Thank you.

MR. MARX: My pleasure. Feel free to interrupt me any time. I'll do the best I can to answer the questions. I can't always.

THE COURT: That one wasn't too hard.

MR. MARX: Okay. Took me a little longer to get to the answer than I think you were expecting, but that happens all the time.

Now, the Plaintiff's position, the FTC's position and the State, too, is that the addition of St. Luke's 10 commercially-insured admissions a day, combined with the 44, by the way that ProMedica admits, will somehow enable ProMedica to raise the rates it or St. Luke's charges commercial payors, like MMO and Anthem, to supra competitive levels.

Now, Mr. Reilly suggested -- he's done this a couple times, so I got curious. He suggested that the Defendant concedes -- they said it in their brief. They had a slide. They said Defendant concedes that Plaintiffs have established a presumption of competitive harm based on high market concentration levels. I heard it this morning. I read it in their brief when we first got their brief. They said, incredibly, Defendant appears virtually to concede that the extraordinarily high market concentration establishes Plaintiff's strong prima facie case.

So I looked at the footnote and I looked at the

cites, because I'm not always that articulate, and I frequently make mistakes when I talk. And I wanted to be sure that I hadn't said something like that. Because if I had, it would have been a terrible mistake. So I looked at page 42 of the transcript from our temporary restraining order discussion, and here's what I said.

First, the Government relies, as Mr. Reilly suggested I would say, the Government relies in the first instance on high market shares and market concentration. The Government says that those high market shares create a presumption of anticompetitive effects, but the cases all hold that high market shares and market concentration only create that presumption when they accurately predict future competitive effects.

And in this case, the market shares and the market concentration in Toledo are not an accurate predictor of the competitor's market power or the likelihood that ProMedica will be able to increase rates above competitive levels as a result of its joinder with St. Luke's.

I didn't make any concession there, at least not one that I've been able -- I've read this a few times, and I don't see where I conceded anything.

And then on the second citation, page 50, I said -- I don't see a concession here either --

The reality of these competitive alternatives and the

substantial constraint on ProMedica, despite its market share, is borne out by the ability of a payor, such as MMO, to exclude ProMedica completely from its network, as it did up until 2008.

So I don't see any concession there, I just want to be sure the record is clear. I haven't conceded, I haven't conceded for a second that they've established a presumption of competitive harm based on high market concentration levels. Not only do I not concede it, they can't prove it.

And when you look at the market share numbers and the concentration levels in the face of the competitive reality of the marketplace, you'll see they haven't met their burden of proof at all.

So for the next three hours, we plan to discuss with you the reasons why, in light of ProMedica's commitment to maintain St. Luke's as a fully operational general acute care inpatient hospital, offering essentially the same services it was providing at the time of the joinder for the next 10 years. And to my knowledge, Plaintiffs still have not cited a case where a court has entered a preliminary injunction in the face of that kind of contractual and performance commitment negotiated by the parties to the transaction.

And tomorrow I'm going to show you -- I'm going to show you where in that joinder agreement it specifically says that St. Luke's board will have a right to enforce it if

ProMedica violates it, but I'm not going to do that today. But I'm going to explain to you why the Plaintiffs are not entitled, in light of that and other facts, to any injunctive relief, let alone the draconian preliminary injunction they have proposed, which ironically would not only return St. Luke's to the perilous financial situation it faced immediately prior to its joinder with ProMedica, but would worsen it. In fact, it would prohibit, as drafted -- I may be misreading it, but I don't think so. As drafted, the Plaintiff's proposed preliminary injunction would prohibit St. Luke's from engaging in conduct that it could have pursued itself, such as, for example, exercising its contractual right to terminate contracts with payors, renegotiating contracts with payors, changing its service offerings, hiring or firing employees, had it not pursued the joinder and continued to operate on its own.

Finally, as I wrap up my introduction to our defense -- I know it seems like more than an introduction -- I want to respond to your question about how hard it might be to unwind the joinder if the FTC somehow prevails in its part three complaint and beyond. We'll talk about this in a little bit more detail tomorrow, as well. I'm not surprised that the FTC would say it's virtually impossible to unwind a consummated deal, but it's really not that hard particularly in this case. Because we know that St. Luke's will continue

to exist as a fully operational general acute inpatient care hospital, offering almost all of the same services that it's offering today. That's not going to change. It's not going to change for 10 years.

But if in the interim for some reason ProMedica does what the FTC predicts it will do -- and we say it won't, by the way -- and that is, raise prices above competitive levels to payors, the FTC has a whole host of remedies that it can pursue in addition to divestiture of the fully operational hospital that will exist in two or three years.

And it's pursued these kinds of remedies in other cases. It could, for example, if we negotiated an anticompetitive agreement with the payor, say, give the payor the right to terminate that agreement on 60 days' notice if it wanted to. The FTC orders that kind of relief all the time in other cases.

Not only that. This case may be an economist's dream. Very rarely do you have a situation where you know exactly what the prices were before the allegedly anticompetitive conduct and what the prices were after the allegedly anticompetitive conduct. We know what the contracts provide today in terms of reimbursement rates.

And if ProMedica, on behalf of St. Luke's, renegotiates a contract that St. Luke's has with a payor, we'll know what the new price is. And if the FTC can prove

that that price is supra competitive, damages calculation ought to be pretty easy. So the FTC will have all sorts of remedies that it can pursue if it ultimately prevails.

It's going to have a hospital that isn't going to be very much different than the one that we have today. And if we do negotiate supra competitive prices in new contracts, they can give the payors the right to terminate the contract, and -- and it will be easy for those payors or the FTC, if it wanted to pursue a remedy of disgorgement or something like that, and I'm not suggesting it by the way, but if they did, they could, because they'd know what the price was before and they'd know what the price was after.

You very rarely see an antitrust case where the computation of damages, if they exist, could be that easy.

So if we lose, if we're wrong about this, and I don't think we are, if we're wrong about all this and ultimately the FTC is able to meet its burden of proof before the Federal Trade Commission, and they can find a way to get the Sixth Circuit to affirm, then there will be a remedy there, and it won't be very hard to undo this deal.

Okay. Let me talk for a minute about what our agenda is for the rest of the afternoon. First, my colleague, Amy Hancock, is going to discuss the legal standard this Court should apply in evaluating Plaintiff's request for injunctive relief and the role of the Court in evaluating both the

underlying merits of the Plaintiff's case and the question whether the requested injunctive relief is in the public interest.

After that, Ms. Carletti's going to discuss St. Luke's deteriorating financial condition and its viability as a stand-alone community hospital as of August 31st, 2010, the date of its joinder with ProMedica.

Then I will come back and discuss the nature and history of competition in the alleged relevant market, as well as the likely competitive effects of the joinder. I doubt that it will come as a surprise to you that the conclusion I will reach is that Plaintiffs cannot meet their burden of showing that the joinder is likely to substantially lessen competition in either the alleged general acute care inpatient services or obstetric services markets in Lucas County.

Mr. Wu will then discuss the parties' motivation for pursuing the joinder, and finally, you'll hear from me for the last time today when I discuss the joinder's pro-competitive benefits both for the parties and for the community they serve.

At the end of the day today, I'll give you a preview of what we intend to talk about tomorrow.

Thank you, Your Honor. With that --

THE COURT: Excuse me.

MR. MARX: Sure.

THE COURT: One of the things which I have not heard from anyone is assuming increased concentration, could a facility dictate admission or exclusion of other entities to coverage under a healthcare insurer's plans, et cetera?

MR. MARX: For example, could ProMedica negotiate with Anthem an agreement that would say we don't want Mercy to be part of the network?

THE COURT: Whoever it may be.

MR. MARX: Sure.

And the answer to that is, they could try. And, indeed, that was the lay of the land, as you'll hear, up until 2008.

And just so we're clear, there's nothing anticompetitive about that either, as long as, as long as the excluded provider has other -- as long as --

THE COURT: Alternatives.

MR. MARX: Exactly. Exactly.

And there's no -- you know, there's no payor that represents, as best I can tell, even in this narrow commercially-insured payor market, no payor represents more than maybe 21, 22 percent.

So to the extent that ProMedica negotiated with Anthem, as it did, to exclude, if you will -- not to include. I don't want to use -- not to include Mercy as part of Anthem's network, Mercy was free to negotiate with MMO, as it

did. And, by the way, it did negotiate the exclusion of ProMedica from MMO's network.

But there was a trade-off there. In exchange for the narrower network, ProMedica said, if you do that, we know that it's going to mean we're going to get more volume of patients from you, because there are going to be a whole host of patients that wouldn't otherwise go to Mercy, and in exchange for that volume we'll give you a better price. That is a pro-competitive result, not an anticompetitive result, and that's what was taking place here.

To a certain extent, we still have that. You've heard a lot about, you'll hear some more about, everybody, all the employers, you know, the payors, they all want open networks. They want to be able to select any provider they want. And in Toledo, for the most part now, that's what happens. Anthem's network is open, MMO's network is open. I think all of them are, except for one.

And, of course, the Government says that these closed networks can't succeed, but then they say but Paramount is doing great. And it is. And the fact that Paramount, with a narrow or limited access network is doing well demonstrates that employers and their insureds will accept the limited access network as long as they're getting some other benefits for it, and one of the benefits they get is a lower price.

So that's a long-winded answer to your simple

question, I think.

THE COURT: Thank you very much.

MR. MARX: Amy.

MS. HANCOCK: Thank you, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MS. HANCOCK: To the extent I'm using slides, they will appear behind tab 2 in the notebook, and they will appear on your screen, of course.

I'm going to discuss the legal standards presented by the case that we're here for. The ultimate question presented by the FTC's challenge here is whether the joinder agreement between ProMedica and St. Luke's violates Section 7 of the Clayton Act. That's 15 U.S.C, Section 18.

Section 7 prohibits mergers where in any line of commerce in any section of the country the results of the merger may be substantially to lessen competition.

Responsibility for deciding this question lies in the first instance with an administrative law judge of the Federal Trade Commission, and then with the five Federal Trade Commissioners themselves on appeal, and ultimately with the Sixth Circuit.

But before we get to the Section 7 question, we have another federal statute that we're dealing with here, and that's section 13(b) of the Federal Trade Commission Act. 13(b) allows the FTC to seek a preliminary injunction to block

consummation of a transaction pending resolution of an administrative trial. The responsibility for deciding the questions under that statute lie with this Court and again, ultimately, with the Sixth Circuit. And what this Court must decide, must exercise its independent responsibility to decide, is whether, weighing the equities, both public and private, determining whether -- considering the likelihood of the Commission's ultimate success on the merits of its Section 7 claim, is entering an injunction in the public interest.

So since Section 13(b) is the primary statute of concern to the Court, let's start there.

The FTC has argued in the past and suggests here that it's entitled to injunctive relief merely because it has alleged an antitrust violation, but that standard has been rejected by the courts.

For example, in FTC versus Freeman, the FTC argued that it need only show a, quote, "fair or tenable chance of success on the merits," and the Court rejected that. As you can see, the Court said, such a standard runs contrary to Congressional intent and reduces the judicial function to a mere rubber stamp of the FTC's decisions. The Court found that Congress expected courts to use their independent judgment to review preliminary injunction actions and said we have, therefore, adopted a more stringent standard.

That more stringent standard is characterized in --

characterized in different ways by different courts, but most often the statement is that to show a likelihood of ultimate success, the FTC must raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for investigation, study, deliberation and determination by the FTC in the first instance, and ultimately, the Court of Appeals.

An articulation of that standard is found in FTC versus Butterworth and also is recited in this FTC versus Freeman.

Significantly, courts have noted that the FTC's burden under this serious, substantial, difficult and doubtful standard is, quote, "not insubstantial." That's what the D.C. Circuit found in a case FTC versus Arch Koal.

In fact, if the FCC shows just a fair or tenable chance of success on the merits, that will not suffice for injunctive relief. That's from FTC versus Tenet Healthcare.

So as the Court of Appeals in D.C. Circuit said in the Whole Foods case, the Court may not simply rubber stamp an injunction whenever the FTC provides some threshold evidence; it must exercise independent judgment about the questions that Section 53(b) commits to it.

So if this Court's role is to exercise independent judgment about the questions committed to it by Section 53(b), what are those questions?

First, what is the FTC's ultimate likelihood of success on the merits of its Section 7 claim? And, second, do the equities favor entering the injunction?

So to synthesize the two statutes and the various roles, it is not appropriate for this Court merely to look at the FTC's complaint and motion, listen to Mr. Reilly's recitation of allegedly high market shares and high concentration and declare that a preliminary injunction is necessary. Rather, the Court must use -- exercise independent judgment and view the evidence presented by both the FTC and the Defendant, weigh the equities, including both public and private equities, and then decide whether the Commission is likely ultimately to succeed on the merits of its Section 7 claim and decide whether entering an injunction is in the public interest.

So turning to the likelihood of ultimate success on the merits. Because the Court does have to make a decision as to the likelihood of that success, it must necessarily dive into the facts and theories that make up the Plaintiff's claim, and it must, of course, concern itself with whether those facts and theories make out a violation of Section 7.

A review of cases from a variety of jurisdictions show that thoroughness with which, even in preliminary injunction hearings, courts have reviewed the Government's claims.

So, for example, a case, California versus Sutter (phonetic), which was a Section 7 case brought by the State of California challenging a hospital merger, but it also was under the same standard, even though the state was the Plaintiff, the Court held a full-day -- four-day evidentiary hearing before denying the State's request for injunctive relief.

In FTC versus Butterworth, the District Court in the Western District of Michigan held a five-day trial and admitted over 900 exhibits before denying the FTC's request for a PI.

In FTC versus Tenet, the District Court also held a five-day trial, and in FTC versus Freeman, the District Court originally granted a request for the TRO without a hearing, but the Court of Appeals reversed and it went back to the district court for a two-day trial and the admission of a ton of evidence.

I mention these cases and the thoroughness of the district court's review not to argue that we should have a longer trial here, as happy as all of those -- all of us from the snowy north are to be here, but rather, to emphasize that the FTC's bold assertion that they're entitled to a preliminary injunction because they filed a complaint and pointed to high market shares is simply not correct. That's not the end of the story.

Rather, this Court must exercise independent judgment and weigh whether all the evidence from both the Plaintiffs and the Defendants supports the request.

All right. So with that, we turn to what are the requirements of Section 7? Section 7 is referred to as an incipiency statute. That is, it forbids mergers or other combinations, the effect of which may be substantially to lessen competition.

But the fact that the statute is forward-looking does not mean that any theoretical claim that a merger or transaction might violate the law is sufficient to state a claim. It might lessen -- the fact that the statute is forward-looking does not mean that any theoretical claim that a merger or other transaction might lead to a lessening of competition is insufficient -- is sufficient to find a violation of Section 7.

I hope Your Honor followed that.

Rather, the Supreme Court has held Section 7 deals in probabilities, not ephemeral possibilities. That's United States versus Marine Bank Corp.

So recognizing that Section 7 deals in probabilities, the Court in Long Island Jewish, United States versus Long Island Jewish Medical Center articulated the standard the Plaintiff must meet to show a Section 7 violation. The Court said, there must be a reasonable probability of a substantial

impairment of competition by an increase in prices above competitive levels to render a merger illegal under Section 7. A mere possibility will not suffice.

The Government has the burden on every aspect of the proof -- proof of its Section 7 claim. It must prove a relevant product in geographic market and that the transaction is likely to have anticompetitive effects in that market.

There was some talk earlier about product in geographic market. We do not agree with the Government's allegation that there is a separate product market for OB services. But the reality is that the primary area of disagreement in this case has to do with whether the FTC can show that the transaction is likely to have anticompetitive effects.

The FTC relies heavily on market concentration and increases in market concentration to support their claim. But as we are going to discuss, the fact that a market is concentrated, even the fact that the transaction results in a large increase in concentration is not enough to justify entry of an injunction.

Mr. Reilly said that we say market shares don't matter, but that's not the case. What we say is what the cases say, which is that market shares and market concentration are merely the beginning of the inquiry.

We cited in our brief to United States versus Baker

Hughes, a case from the D.C. Circuit, which involved very high market shares, and what the Court referred to as a, quote, "dramatic increase in HHI as a result of the transaction." Nevertheless, the injunction was denied in that case.

High concentration levels are common in many markets, including in virtually all nonurban hospital markets. And that fact is significant not just for this case but for the future and the implications of some of the things the FTC's theory suggests. They argue that whenever there is a merger in a concentrated market that results in a merger guidelines violation of the concentration levels and the elimination of a competitor, they're entitled to an injunction. But virtually every hospital market in the United States, outside of very large cities, New York City, Chicago, has very few competitors, hospital competitors. Toledo has four. Most markets have actually fewer than that; some five.

The implication of the Government's analysis is that virtually any hospital merger in any market is going to entitle the FTC to an injunction, and that's a very significant fact, given that all over the country, hospitals are facing pressures brought about by the provisions of healthcare reform to consolidate in order to do things like have accountable care organizations and other factors that healthcare reform is going to impose on the markets.

So as I mentioned, most nonurban hospital markets are

very concentrated. And, in fact, the FTC has requested preliminary injunctions in several of them.

Between 1993 and 2000, the Government brought six hospital merger challenges and did not persuade a federal court to grant a preliminary injunction in any one of them.

If we could have the next slide.

I'm going to talk about these cases just a little bit. The first one, Your Honor, is FTC versus Butterworth. Again, a case that's been mentioned from the Western District of Michigan. The Government alleged a general acute inpatient hospital services market and a separate primary care inpatient hospital services market. And interestingly, that market, that second market, the primary care inpatient market, was also a cluster market, like the general acute care market. The FTC points to that as precedent for the fact that their OB services market is a relevant geographic market -- a relevant product market. But nothing in that case suggested that -- first of all, the Court described that market, the primary care services market, the evidentiary basis for it the Court described as very thin.

But there's nothing in that case or any other case to suggest that you could pluck a single service, OB, out of the all of the general acute care services that are offered inside a hospital and say that's a relevant product.

In any event, in both markets as you could see the

market concentration numbers were high, pre and post market shares were high and the increases in HHI were very high.

The Court -- after a five-day evidentiary trial, the Court agreed that the FTC had made out its prima facie case for a violation of Section 7, but it nevertheless refused to grant the injunction. The Court was persuaded that the two hospitals' justification for the merger, that it would result in efficiencies and cost savings because, for among other reasons, it would eliminate the need for one of the hospitals to build an entirely new facility might result in benefits to the community that outweighed the anticompetitive effect.

The next case we're going to talk -- I wanted to mention is FTC versus Tenet Healthcare. Again, the product market was alleged to be general acute inpatient services. And the case involved the merger of two hospitals in Poplar Bluff, Missouri, a small town in the southeast section of that state. The two merging hospitals were the only two hospitals in Poplar Bluff, although Tenet owned another hospital within the same general geographic area, and there were other larger hospitals in nearby communities.

The FTC alleged that in its geographic market, the merging firms accounted for 84 percent of the market, and had, as you can see, extraordinarily high HHIs.

A preliminary injunction was granted by the District Court in that case, but reversed by the Court of Appeals. As

they do here, the FTC pointed to testimony that supposedly established that payors believed it was essential, essential for their plans to include a Poplar Bluff hospital in their benefit package because their subscribers would not travel to other towns for primary and secondary care services.

According to payor testimony, their subscribers, quote, "find it convenient to use a Poplar Bluff hospital, and therefore the payors asserted that they would not be able to steer patients away from Poplar Bluff hospitals in response to a price increase." These facts are discussed at page 1049 of the decision.

The Court of Appeals found the geographic market contrived, and indeed, absurd, and reversed the District Court's grant of a preliminary injunction.

THE COURT: Well, we don't have -- do we really have any question about geographic market as contrasted to lines of service, as I prefer to call it?

MS. HANCOCK: Exactly. No, we don't have a question about geographic market, but the decisions that the -- we don't have much of a question about geographic market, before Mr. Marx throws something at me.

The fact that the case was decided on the Government's failure to properly allege a geographic market isn't the end of the inquiry from our perspective in terms of what the case teaches us about useful lessons applicable to

this case.

The Court noted that the reliance on the testimony of large sophisticated third-party payors, managed care companies like Anthem, MMO and Aetna would be here, to the effect that they were powerless in the face of a price increase was, as the Court said, suspect.

The Court said, we question the District Court's reliance on the testimony in face of -- in the face of contrary evidence that these for-profit entities would unhesitatingly accept a price increase rather than steer their subscribers to hospitals in nearby communities. Without necessarily being disingenuous or self-serving, or both, the testimony is at least contrary to the payor's economic interests, and thus, suspect.

And the Court went on: In spite of their testimony to the contrary, the evidence shows that large, sophisticated third-party buyers can and do resist price increases, especially where consolidation results in cost savings to the merging entities. The testimony of the market participants spoke to current competitor perceptions and consumer habits and failed to show where customers would practicably go for inpatient hospital services, by implication and response to a price increase.

That's precisely the position here, Your Honor. The FTC points to payor affidavits and declarations allegedly to

the effect that ProMedica will have increased leverage as a result of this transaction, and it points to evidence allegedly showing that some of St. Luke's patients prefer not to travel beyond southwest Toledo.

But as will be discussed in greater detail by my colleagues a little bit later on, that evidence is suspect. And although there is some characteristics of the Tenet case that are very like this case, there are some important differences. Here, after the merger, two very significant competitors continued to exist within the confines of the geographic market alleged by the Government. Payors don't have to convince purchasers of services to go to Cleveland for those services, they only have to convince someone to go to St. Vincent instead of the Toledo Hospital. There's no geographic difference between St. Vincent's and Toledo Hospital.

So we're not talking about having to expand the geographic market. We're saying that the real competitive conditions on the ground are such that these large sophisticated payors have the ability to steer patients away from ProMedica hospital in response to a price increase. And the Government's failure to take into account the likely market dynamics in response to the merger, instead their focus exclusively on the static conditions that exist today, is inappropriate, and that's what the case stands for.

The next case I want to discuss is FTC versus Freeman. This is another case involving a merger of two hospitals in a small to medium size town in Missouri. The case involved two hospitals in Joplin, Missouri, where there were three hospitals before the merger, one large, and the two merging parties, both of which were smaller. And of those two smaller hospitals, Oak Hill had, according to the decision, been experiencing financial difficulties such that its trustees believed a merger with Freeman would strengthen its financial standing and enable it better to compete.

The Court of Appeals in that case upheld the District Court's decision to deny the request for preliminary injunction, and, again, although the decision deals with whether the evidence supported the alleged geographic market, the Court's criticism of the FTC's evidence is relevant here on the point that it's too static, it presents a too static view of the market.

As the Court said, the testimony from market participants in this case spoke mainly to current competitor perceptions and current consumer habits and not to the crucial question of where consumers could practicably go to seek alternative acute care inpatient services in the event of a merger.

A similar finding about the impact and relevance of customer complaints is expressed in a case that was not a

hospital merger case, FTC versus Arch Koal. There, the Court of Appeals for the District of Columbia Circuit found that while the Court does not doubt the sincerity of the anxiety expressed by customers, the substance of their concern articulated is little more than a truism of economics. A decrease in the number of suppliers may lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to say what will happen in the market.

And, again, that's FTC versus Arch Koal, 329 F.2d, at 145.

And so returning to the hospital merger cases, United States versus Long Island Jewish Medical Center, a case from the Eastern District of New York, in this challenge brought by the Department of Justice rather than the Federal Trade Commission, but nevertheless involving the same statute, Section 7 and Section 13(b), there are some aspects of this case that are similar to the aspects of Long Island Jewish that are similar to this case in that the FTC alleges here the combination of ProMedica and St. Luke's creates a must-have hospital system, and there, the Government made a similar allegation.

The merging parties, Northshore Hospital System and Long Island Jewish were located just 2 miles from each other. The hospitals were described as being fierce competitors, and

both were quality teaching hospitals that provide high level training programs. The Government alleged a product mark market consisting of acute inpatient services provided by anchor hospitals to managed care plans, and in that product market in the geographic market alleged, the merged firm had a 100 percent market share.

Nevertheless, the Court denied a preliminary injunction, again focusing on the fact that the Government's theory of the case failed adequately to address the real world competitive conditions faced by the hospitals.

Despite the Government's economic expert's testimony that he had calculated the merged firms would have the ability to raise prices 20 percent, the Court found that the Government had not shown likely anticompetitive effects. According to the Court's decision, the Government failed to prove by a preponderance of evidence that the merged entity would, in all probability, produce an anticompetitive effect by a price rise above competitive levels.

In reaching this conclusion, the Court was influenced by evidence that there were suitable alternative hospitals. As here, the evidence showed that there were several hospitals offering identical services to the merging parties located within a few miles of them. And also, the Court was influenced by the countervailing bargaining power of the large insurance companies in the market, among other factors.

The last of the cases I'm going to discuss in detail, Your Honor, is United States versus Mercy Health System. There, the Government sued to challenge the merger of the only two general acute care hospitals in Dubuque, Iowa.

THE COURT: It should be made clear for the record that this is totally unrelated to the Mercy system that has been referred to in these proceedings.

MS. HANCOCK: You are exactly right, Your Honor. Thank you.

Again, the facts presented a market with allegedly very high market shares. According to the Government, the two hospitals would have had a combined 78 percent share of the market for general acute inpatient services. Nevertheless, a preliminary injunction was denied, and after a careful review of actual marketplace realities facing the hospitals and the payors in the market.

As the Court noted in that case, although a great deal of emphasis is placed on market share statistics, they are not conclusive indicators of anticompetitive effects. That's at 902 F.Supp, at 976.

Further, like other courts that have denied government requests, the Mercy Health Systems court found that the Government's case rests too heavily on past healthcare conditions and makes invalid assumptions as to the reactions of third party payors and patients to price changes. The

Government's case fails to undergo a dynamic approach to antitrust analysis, choosing instead to look at the situation as it currently exists within a competitive market.

In short, the decisions in these litigated hospital merger cases demonstrate, first and foremost, that the existence of high market shares and an increase in concentration, even a very large increase in concentration, simply is not enough to justify the entry of a preliminary injunction where, as will be the case here, the evidence shows the market is and will continue to function competitively.

And, secondly, they show courts even at a preliminary injunction stage, closely and in detail analyzing the factors necessary to establish whether the FTC is likely to prevail on its Section 7 claim.

Finally, what we learned from these courts is, as the District Court for the District of Columbia said in FTC versus Arch Koal, antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future.

THE COURT: Go ahead and finish it. I have a question.

MS. HANCOCK: That's fine. Now's a good time.

THE COURT: Now, I'm listening and I'm guessing -- you don't have to guess very much -- that ProMedica and

St. Luke's are objecting to the selection of these two segments of their respective offerings to the public, acute care and OB, because they are the most -- those which reflect the largest growth concentration.

Do the cases ever discuss the favorable, in most instances I would surmise, or unfavorable impact on other lines of service, which impact is made possible as a result of the increased concentration?

MS. HANCOCK: Well, let me take it one step at a time.

First of all, ProMedica does not object to the product market, the general acute care inpatient services product market. That is the product market, it's referred to as a cluster market, that has been used by all the cases that analyze hospital mergers in recent times, and it is the appropriate market in which to analyze the effects of the merger of two hospitals.

THE COURT: Thank you.

MS. HANCOCK: We do object to plucking out of that general cluster market the single service of OB, and we don't think that there's any legal support for that in the case law or any basis for doing it other than to give the Government the advantage of being able to stand up and say it's merger to duopoly.

But there's no basis for taking OB out of the general

acute care market. It is true that someone who wants to deliver a baby can only deliver a baby. They don't want a knee replacement. But that's also true of every other individual service line that's offered in hospitals.

In terms of the second part of your question, Your Honor, I'm not sure I understand whether they've --

THE COURT: Well, let me --

MS. HANCOCK: Does the combination of the general acute care services give either party market power in some other, like, tertiary services that aren't part of the alleged market? Is that . . .

THE COURT: In other words, do the cases discuss the probable impact on the abilities of the providers of these services to increase the concentration in those areas, as well, and/or to dictate because of their increased, call it power, bargaining power, with respect to those lines of service?

MS. HANCOCK: And I think the answer, subject to being corrected by people who are smarter than me about this, I think the answer to that is no. The point of defining the relevant market, to say this is the market in which we are going to analyze the effects of this transaction is, it's saying this is the group of products or services that are reasonably interchangeable as to which, if one could exercise power and raise prices over this group of products, that would

have an impact on customers' choices.

The point of leaving other products and services out is that a price increase in the chosen product market is not going to have an impact on the products that are not part of the product market.

So the structure -- so in order to determine whether there's a Section 7 violation, you don't just look at market shares and market power and market concentration. You have to look at the structure, history and probable future of the market. And Mr. Marx, Ms. Carletti, Mr. Wu are all going to discuss factors related to the structure, history and probable future of this market.

But what I would just say is that the evidence in this case will show, that when analyzing those factors, the probable future of the market for inpatient hospital services in Toledo, the joinder of St. Luke's hospital into the ProMedica Health System will not confer upon ProMedica the sort of market power condemned by Section 7. That is, the power to raise prices above a competitive level.

And that brings me to an additional area of disagreement between us and the FTC over what must be shown to show a likely anticompetitive effect.

An anticompetitive effect in the context of a Section 7 case is determined by looking at, first, with reasonable probability, will the merged entity have enough market power

to enable it to increase prices above a competitive level?

Is that the wrong slide? No, that's it. Okay.

Increase prices above competitive levels for a substantial period of time. And, second, will the merged entity reduce the quality of care, treatment or medical services rendered? This is from United States versus Long Island Jewish Medical Center.

Here, although the Plaintiffs point to some comments made when St. Luke's was -- first began its discussions with ProMedica suggesting concerns on St. Luke's part about ProMedica's quality scores, there is no serious evidence to support the notion that ProMedica has any intension to or is likely to try to reduce the quality of care of medical services offered at St. Luke's. Any such claim is clearly contrary to every intent and every incentive that ProMedica has to maintain the quality of St. Luke's.

Rather, Plaintiff focuses more on their price claims. Their characterization of the likely impact on prices in the market as a result of the transaction is not consistent with the requirement of establishing a Section 7 claim. They point to the possibility that prices will rise, and say that that shows a Section 7 violation. But Section 7 does not condemn price increases, nor does it condemn price increases that result from mergers. Section 7 forbids mergers where the effect may be substantially to lessen competition. And when

courts have talked about substantial lessening of competition, they have talked about the ability to raise prices above a competitive level.

Plaintiffs have not argued and they cannot prove that ProMedica is currently achieving supra competitive prices and as will be discussed in much greater detail later, they're not going to be able to show that they're likely to be able to raise prices to a supra competitive level as a result of the merger.

The next question in front of the judge on~-- in front of the Court, I beg your pardon, on the Section 13 fee, is weighing the equities. In addition to considering whether Plaintiffs have demonstrated that they are likely to prevail on the merits, the Court must separately consider whether equities favor entering the injunction.

Under Section 53B, the Court may properly consider both public and private equities, and many courts deny preliminary injunctions in hospital merger cases on the grounds that the equities do not support entry of the injunction, even in a case where the Plaintiff has made out a prima facie showing. That is, in FTC versus Butterworth where the Court denied a preliminary injunction even though they found that the FTC had made its prima facie showing of a Section 7 violation, the Court nevertheless found that the public interest in the likely efficiencies that would be

achieved from the consolidation of the two hospitals justified denying the injunction.

Also in FTC versus Freeman, the Court denied an injunction on equities ground where one hospital's financial status was such that it might not be in business to complete the merger by the time the FTC concluded its administrative hearing.

This Court must weigh the equities and make an independent determination as to whether those equities favor the entry of an injunction, and deny the Plaintiff's request if it finds that they do not. And that analysis and inquiry is separate from and distinct from the inquiry of whether they are likely to succeed on the merits of their Section 7 claim.

And finally, the last legal standard sort of issue has to do with the purpose of the injunction under Section 13(b). Again, Mr. Marx is going to discuss in greater detail the reasons why the evidence demonstrates that an injunction is not necessary here for the reasons that injunctions are required in Section 13(b). The purpose of an injunction is to avoid the need for intrusive relief later on, since the difficulty of unscrambling the merged assets often precludes an effective order of divestiture. That's a quote from FTC versus Whole Foods.

But here, we submit that an effective order of divestiture can be achieved without the need for the

injunction. Mr. Marx has already mentioned the reasons for that, and there will some additional discussion of it again later.

And with that, Your Honor, I'm done, unless you have questions for me.

THE COURT: No, thank you. You've answered them.

MS. CARLETTI: Good afternoon, Your Honor. While I have the dubious task of discussing financials and St. Luke's financial viability on August 31st of 2010, I'm going to be speaking for about a half hour. So we can keep going through. I don't know if you want to take a break?

THE COURT: No, why don't we go ahead and when you're through, we'll take a break.

MS. CARLETTI: Okay.

Well, like I said, what I'm going to be discussing for the next half hour or so is St. Luke's financial stability, its viability and its deteriorating financial state as of August 31st of 2010. And if you actually look at St. Luke's operating expenses over the course of the last decade, you'll see some -- a lot of red on that graph. You'll note that over the course of the last decade, St. Luke's operating expenses exceeded its net patient revenue every year over the course of the last decade except for four. And even in the last five years alone, St. Luke's operating expenses exceeded its operating income in every year but one, and that

was 2006, when St. Luke's was able to have operating income of about [redacted].

Ultimately in 2007, though, that number dropped significantly, and St. Luke's recorded an operating loss of [redacted].

Now, these results don't change if you look at St. Luke's parent company, Ohio Care. In fact, these results get worse. In 2007 alone, Ohio Care recorded an operating loss of over [redacted]. 2008, that number jumped to be an operating loss for Ohio Care of over [redacted]. And in 2009, Ohio Care recorded over [redacted] in operating losses.

Now, in the past, up until about 2008, St. Luke's had been able to use its investment income to generate the cash that it needed to operate the hospital. And oftentimes that masked the hospital's operating losses. But in 2008, with the market crash, St. Luke's could no longer do that, and it could no longer subsidize its hospital losses with its investment income.

Now, prior to the hiring of Dan Wakeman in 2008, St. Luke's tried a number of different things to improve its financial performance, and I will note that it was unsuccessful in doing so. It laid off employees, it developed a management services organization to try to support independent and additional employed physicians, it renegotiated its payor contracts, it leveraged its investments

through leases and short-term financing, and it cut expenses for medical supplies.

And the Plaintiff's right, in 2008, St. Luke's brought Dan Wakeman on to try to turn things around. And when he came onboard he established a three-year strategic plan, with the main goal to try to improve St. Luke's financials and get its declining revenues -- and getting its declining revenues up, but also to try to decrease its costs.

And once Wakeman started at St. Luke's, he began implementing additional measures, along with the St. Luke's staff, to try to cut costs in 2008 and 2009.

He froze capital spending, with the exception of capital that was necessary for patient safety, patient care, regulatory oversight, the breakdown of necessary assets, or capital expenditures that were needed for very high strategic importance.

He also reduced senior management salaries, and he froze the salaries of other staff members. St. Luke's also froze its hiring for all employees, other than the hiring of replacements of individuals who were related to patient care services and patient safety. In fact, St. Luke's at the time had developed a committee that would actually review every single individual who St. Luke's was considering hiring and determine whether they should hire that person and whether or not it fit within their goals.

At the same time, St. Luke's reduced its paid time off for employees and required employees to contribute greater amounts for their health insurance, and actually converted its defined benefit retirement plan to a defined contribution retirement plan.

Earlier this morning you heard Mr. Reilly tell you, this is what everybody was doing. The economy was going down. And he's right, companies all over this country were doing this at the time of the drop in the economy.

But there's one key factor that's unique to St. Luke's. They were cutting themselves down to the bone, and in 2009, St. Luke's Hospital was the only hospital in Toledo that didn't make a profit. Everybody else did.

You also heard a little bit this morning about Dan Wakeman's three-year plan and -- but you didn't really hear a lot of details about what that plan was, and overall, what the strategic initiative was.

When Dan Wakeman came to St. Luke's, he developed his three-year strategic goal and it was based off of five pillars, one of which was growth. The other were things like people, quality, service, finance, corporate initiatives. A large part of the growth plan, the thing we're really focused on here, entailed removing services from St. Luke's general acute care inpatient offerings and shifting those to outpatient services.

Now, to the extent that Wakeman succeeded in doing that, to the extent he succeeded in increasing outpatient volume, that didn't have any effect on inpatient acute care revenue. And that really is the key focus here in this case. It's the market that the Plaintiffs are focused on, and as you'll see in a little bit, covering of the cost that St. Luke's had to provide inpatient care ultimately was the real problem that St. Luke's had.

And an initiative to try to increase outpatient revenue didn't fix that problem. And I'll show you some slides in a little bit that actually show you that.

Another large element of the growth plan that Dan Wakeman had was to rebuild St. Luke's staff by acquiring additional physician practices. And this morning Mr. Reilly showed you a slide. I think it was number 113, which actually showed you Ohio Care's patient revenue, not profits, not EBITDA, but only patient revenue over the last decade or so. And if you notice the large jump he pointed to in 2009, well, that large jump was due to Dan Wakeman's goal of acquiring additional patient practices, and that revenue that came in from that jump --

THE COURT: You mean doctors' practices.

MS. CARLETTI: Sorry, doctors' practice, you're absolutely right. And the revenue that came in from that large jump, while it did increase Ohio Care's revenue in

general, I believe that everybody here would agree that that growth is not necessarily sustainable. And so you saw that increase by the acquisition of these additional practices, but it's just not sustainable.

THE COURT: And I presume the increase was, in part, offset by the cost of the acquisition and the continuing cost in some instances of the acquisition.

MS. CARLETTI: Absolutely. Absolutely.

And those costs and the revenue ultimately, I think the financials show, that the revenue that comes in, and you'll see it with the cost coverage issues, ultimately weren't able to cover the cost of care that St. Luke's was providing. So ultimately, St. Luke's was different from the prior hospitals and the prior turnaround situations that Dan Wakeman had.

And we also had a declining economy. And although Dan Wakeman was unable -- was able to meet some of his goals, he was unable to get St. Luke's financials to the point where it could continue as a viable community hospital servicing this community.

And I'll actually show you what those numbers look like, if we could pull the screen back up. Let's go back to slide two.

You see that in 2007, like I said, we had a operating loss of [redacted]. In 2008, that jumped to [redacted].

In 2009, that plummeted all the way down to [redacted].

And I want to point 2009 out to you for a key reason. And that is this morning, if you remember when Mr. Reilly was going through all of the goals that Mr. Wakeman had met, he showed you that Mr. Wakeman had achieved most of those goals by the early half of 2009, and yet, you see that St. Luke's operating losses [redacted] between 2008 and 2009, when he supposedly met every one of the goals.

So what was the result of this? Well, first and foremost, St. Luke's financial performance caused Moody's to downgrade St. Luke's bond rating four grades, and that downgrade happened in just 16 months. In other words, in just 16 months, St. Luke's ability to access capital markets decreased significantly. And that resulted in an increase of St. Luke's costs of borrowing.

Now, Moody's analysis downgrading St. Luke's bond rating is very telling, and ultimately, Mooing's concluded that it was downgrading St. Luke's really for three reasons. First, because St. Luke's had sustained continued operating losses, and those losses [redacted].

The other reason that was a significant factor for Moody's was the fact that St. Luke's had unfavorable commercial payor contracts. Ultimately, the reimbursement rates it received from its payors just weren't covering its

costs.

And, finally, Moody's was also concerned, and one of the reasons it cited in its opinion downgrading the bond rating was, St. Luke's depleting cash reserves.

Now, the Plaintiffs will argue and have told you that based upon their expert's analysis, St. Luke's rating was going to go up, and their expert, Mr. Bricks, came to that conclusion by doing no independent verification of his own. And I think we've gone through this fully in our Daubert motion, but ultimately, the conclusions that Mr. Bricks comes to regarding St. Luke's bond ratings is really based off of looking at the documents and doing no independent verification of his own.

So let's actually look at what Moody said. Let's go to the next one. Oh, I'm sorry. Keep going back. All the way back to number 7. There we go.

One of the challenges that Moody's identified for St. Luke's in downgrading its bond rating was the fact that it had three consecutive years of operating losses. And this was the exact state that St. Luke's found itself in at the time of the transaction.

Moody's also noted that a continued challenge would be St. Luke's unfavorable commercial contracts and its ongoing challenges with negotiating higher commercial reimbursement rates with its two largest commercial payors, who at the time

were MMO and Anthem.

And as you can see here, Moody's identifies them as accounting for approximately 22 percent of St. Luke's gross revenue.

Later in the report, Moody's notes that St. Luke's inability to negotiate more competitively priced contracts with its payors is one of its challenges, but also that St. Luke's commercial payor rates -- and it's not on this slide, but they said St. Luke's commercial payor rates were, quote, "well under the market medians in the region."

The market conditions that St. Luke's faced in Toledo were also among St. Luke's most difficult and important challenges going forward. As you can see here, Moody's recognized the challenge of competing in this market, and noted it was a very competitive market, with a number of hospitals that were part of two larger and financially stronger systems, ProMedica and Mercy, both of which had higher bond ratings than St. Luke's, and also in both --

Next one.

And also in St. Luke's primary service area, as well as Toledo at large, St. Luke's faced weak demographics, declining volume trends, high-end employment levels and low median income levels. This didn't seem like it was going to change, and there didn't seem to be much improvement in sight.

Ultimately, Moody's was also concerned about

St. Luke's cash reserves and how St. Luke's --

Go ahead. You can go to the next one.

-- and how St. Luke's decrease in operating cash flow could result in a depletion of St. Luke's cash reserves. And, in fact, Moody's stated this outlook reflects our concern that cash reserves could decline if operating cash flow deficits continue.

Now, the issue here with the cash reserves I think is important, and there wasn't much talked about it this morning, but one of the theories that the Plaintiffs and their expert, Mr. Gabe Dagen, had put forward is that the solution to St. Luke's financial problems at the time were for St. Luke's just to drive down its cash reserves, for it to dip into its unrestricted net assets, and it didn't really matter where the cash came from, just as long as St. Luke's had cash available to spend it on its operations.

But this suggestion really ignores the reality of what a reserve is. It's a safety net. And if you bleed down that reserve fund, you jeopardize the hospital's future financial viability. It's exactly what Moody's recognized, too. And it also ignored the fact that ratings companies like Moody's focus on cash reserves and depleting cash reserves and what the consequences of that could be.

And that is a reduction in the hospital's ability to meet its outstanding obligations and borrow the capital

necessary to continue to invest in its future. And ultimately, as a result of St. Luke's financial performance in 2008 and 2009 and Moody's downgrade of St. Luke's bond rating, St. Luke's violated its refunding bonds.

And at the time, St. Luke's had approximately $8.3 million outstanding for the refunding bonds that the City of Maumee had issued on St. Luke's behalf. These were insured by Ambac (phonetic). At the time, Ambac issued a notice of default which actually gave Ambac the right to call the balance of the bonds. But the only way that Ambac granted a waiver of that default was the closing of this joinder with ProMedica.

St. Luke's financial performance and its operating losses also affected its ability to make necessary capital expenditures so that it could keep up with both patient care and healthcare reform. As you might be aware, healthcare reform requires quote-unquote meaningful use of electronic medical records, or EMR systems by 2015. And if a hospital doesn't meet that requirement, it will face cuts in its Medicare reimbursement.

Even with federal stimulus funds, St. Luke's did not have the capital that was required to purchase, to implement, or to support the infrastructure, systems and personnel required for an EMR. But that wasn't it. St. Luke's had a nurse call system that experienced regular downtime, and the

manufacturer no longer supported the system. But in August of 2010, St. Luke's didn't have the $700,000 available to install a new system, and, in fact, had deferred the installation of that system indefinitely.

Also, the radiographic surgery tables that surgeons at St. Luke's uses to guide them through certain procedures were beyond their useful life at St. Luke's. But, again, St. Luke's didn't have the $450,000 necessary to invest in these assets.

Same is true for its air handler. It needed a new air handler for its heating and air conditioning system. It is beyond its normal life. But, again, St. Luke's didn't have the $250,000 necessary to buy a new one and has deferred investment in it until 2012, which is risking heating and air conditioning outages at the hospital.

The 11 birthing beds -- there are 11 birthing beds that St. Luke's uses that are currently over 10 years old and are past their useful life. New beds would cost $110,000, but this purchase has now been put off indefinitely because St. Luke's doesn't have the money to pay for it.

The same is true for a $50,000 parking lot repair. St. Luke's didn't have the funds to be able to repair this.

And as you've heard a lot about, St. Luke's could not sufficiently fund its defined benefit or pension plan for its retirees. At the time of the joinder, St. Luke's faced an

unfunded pension liability of [redacted].

Can we go back for a second?

Let me be clear about one thing. We are not asserting a failing firm defense in this case. But the financial liability of St. Luke's at the time of the joinder is relevant, and it's relevant to the issue of St. Luke's competitive significance in this market. It's relevant to how St. Luke's was perceived by the market, other competitors, the payors, employees and the patients that it served.

And can we pull up the next slide but not show it to the gallery?

As you can see here in June of 2010, one of St. Luke's competitors recognized its financial difficulties and the consequences that those financial difficulties might have on St. Luke's business. I'm not going to name who this was, but I will quote part of it to you. And it says, there are multiple issues including theirs, St. Luke's, very poor financial help. Their pension obligations were unfunded by over [redacted], and year to date, they have an operating loss of [redacted]. Apparently, they have no action plan to deal with either one of these.

Even though, as the Plaintiffs have pointed out, St. Luke's has treated an increasing number of inpatients and outpatients, it still could not make up for this operating shortfall. And that's because the turnaround measures that

Dan Wakeman and St. Luke's tried to implement never solved the real problem. It never solved the fact that St. Luke's contracts with its commercial payors weren't covering its costs.

You heard a lot this morning about revenues. You heard a lot this morning about increasing in volumes, but you never heard anything about the other side of that coin, and that is what it took to pay for St. Luke's to provide those services.

Now, St. Luke's was unable to do what hospitals both in and out of Toledo are able to do in their contracts with commercial payors. They were able -- they weren't able to negotiate the best rates possible so that they could, at a minimum --

And let's pull up the slide but not show it to the gallery.

St. Luke's was unable to do what everybody else in and out of Toledo tried to do, which was get the highest possible reimbursement rates to cover their indirect and direct costs, but also allow it to generate a small operating margin that would allow the hospital to support indigent and charity care, as well as invest in its own future.

And as you can see by this slide, and I'll give you a chance to look at that --

THE COURT: All right. Thank you.

MS. CARLETTI: -- as well as the next one, which is another slide, that's the exact goal of what other hospitals in the area were doing.

Okay. Let's pull up now 16, please.

And like I said, you saw a lot this morning about revenues and the fact that in 2009, St. Luke's received just over [redacted] in total payments, but you never heard about the other side, which is that in 2009, it cost St. Luke's over [redacted] to provide those services. Ultimately, it had a [redacted] deficit between total reimbursements and total costs in 2009 alone.

That ultimately resulted in a cost coverage ratio of [redacted]. What does that mean? Well, for every dollar that St. Luke's spent on treating a patient, it only collected [redacted]. And that was in 2009.

And what I want to point out about 2009 is that for the first half of 2009 St. Luke's was not in Anthem's network. It was receiving out-of-network rates from Anthem. And as you'll see in a little bit, Anthem was one of its top four payors. So ultimately, for the first half of the year it was receiving higher rates than what it ultimately got in the last half of the year.

And if you actually look at Anthem's cost coverage ratio for St. Luke's in 2010, a year in which St. Luke's was part of the Anthem network for the whole year, St. Luke's cost

coverage ratio with Anthem in 2010 was less than a hundred percent, [redacted].

So let's actually turn to the next slide and talk a little bit about payors. The one thing I do want to note is that St. Luke's cost coverage ratio in 2009 was [redacted]. That's the year in which Dan Wakeman supposedly met most of his goals.

But the cost coverage ratio over time at St. Luke's had decreased. If you looked at 2006, St. Luke's cost coverage ratio for all of its payors was [redacted]. In 2009, that decreased to [redacted].

Now, that [redacted] cost coverage ratio in 2006 includes Medicare, Medicaid, Charity Care, entities that St. Luke's doesn't negotiate its reimbursement rates. So if you actually take those out, you take out Medicare, Medicaid and Charity Care, St. Luke's cost coverage ratios from 2006 to 2009 follow the exact same trajectory.

In 2006, the cost coverage ratio, excluding those entities, was [redacted], and that dropped to [redacted] in 2009.

Ultimately, what does that mean? Well, St. Luke's commercial contracts were unable to contribute towards its cost, and it was insufficient to support Medicare, Medicaid and Charity Care, as well as St. Luke's investment in its future.

And that's significant, because as you can see here, out of the total pool of St. Luke's largest payors and the charges that it made for general acute care medical services, in 2009, [redacted] of its total charges for general acute medical services were with four payors: Medicare, Medicaid, and then its two largest commercial payors, MMO and Anthem.

And in 2009, three of those payors had cost coverage ratios less than a hundred percent. And as we were just talking about a few minutes ago, Anthem was above a hundred percent, although that number reflects the fact that it received higher out-of-network rates for the first half of the year, and if you look at its 2010 number, it also is below a hundred percent.

And I want to use MMO as a quick example to show you this decline in the trajectory of the cost coverage ratios and how things just got worse even after Dan Wakeman came in with his turnaround plan.

In 2006, MMO's cost coverage ratio was [redacted]. It was meeting its costs but it was just barely doing it. In 2009, that dropped to [redacted]. And this also happened with most of St. Luke's other payors. You have the exact same trajectory downward.

And, again, as I note here on the slide, the Anthem numbers for 2009, again, are just over a hundred percent, but those reflect out-of-network rates.

I'd like to show you this point in another way, which ultimately is that St. Luke's couldn't cover the cost of care for its services. And I'll break this out by inpatient and outpatient.

In 2009, MMO, St. Luke's largest commercial payor, on average for every inpatient that St. Luke's saw, it lost over [redacted]. For every outpatient it made [redacted].

For Anthem, if you look at its in-network rates from July 1st, 2009, to December 31st, 2009, on average for every inpatient that St. Luke's saw, it lost over [redacted], and the [redacted] per outpatient it made was nowhere near able to cover that deficit.

In general, St. Luke's inpatient rates were approximately [redacted] percent below market average on a per diem basis and [redacted] percent on a case rate basis.

In St. Luke's situation, where its inpatient rates were so far below market and its cost coverage ratios for commercial payors were below a hundred percent, any increase in patient volume, no matter how high it was, and the focus of the Plaintiffs of increase in revenue and increase in volume doesn't take this into consideration. Any increase in volume was not going to make up this difference, it just wasn't.

THE COURT: To what do you attribute the tremendous differential in inpatient?

MS. CARLETTI: I think just the higher cost and the

inability to recover those costs and the rates that they were receiving.

THE COURT: Inability --

MS. CARLETTI: Uh-huh.

THE COURT: Inadequate negotiating ing posture.

MS. CARLETTI: That, and the fact -- and this is exactly what I was getting to. When St. Luke's went to these commercial payors, when it realized this problem, it went to MMO and Anthem and it said, look, we need to increase our rates. We need to do it so we can continue to remain a viable stand-alone community hospital. And MMO and Anthem told them no, they weren't significant enough, they weren't going to do it. They weren't going to increase those rates.

And you know, the intent in those negotiations was to simply secure interim rate increases that would at least cover St. Luke's cost of treating Anthem and MMO patients. And the intent there was to increase those rates 'til the end of the contract and then sit down again and try to increase those rates once again. Because fundamentally this was the problem. It wasn't trying to cut costs. You know, they tried to cut costs. It didn't work. And ultimately, the problem here was trying to get those reimbursement rates up. And it didn't work.

And once St. Luke's and Dan Wakeman realized that and tried to fix it, they couldn't do anything else. You know,

this is what I was moving into next, but they looked at other options. They looked at reducing their workforce. They looked at reducing salaries and wages by $6 million and reducing their benefits by 31 percent. But it wasn't going to get them to break even.

They looked at cutting these services, obstetrics, cardiac services, the diabetes center, you know, all of these services where the reimbursements and the revenues that St. Luke's took in under its payor contracts didn't positively contribute to its finances.

But even cutting these services wouldn't have taken St. Luke's to a break even point. And, in fact, it would have detrimentally affected the community. It would have resulted in a reduction of 25 percent of St. Luke's staff.

So in the end, St. Luke's was bleeding. And in the words of Dan Wakeman, as of December 15th 2009, St. Luke's was in a dire financial position. It couldn't change its rates with its payors.

Now, obviously the Plaintiffs dispute this, and based upon their expert's analysis, they argue that St. Luke's was going to turn the tides, it was going to have positive -- operate in positive cash flows and it was going to be able to do that through 2013. I would submit to you that these conclusions are really sensitive to the assumptions that Dagen makes in coming up with these projections.

One of which was the fact that St. Luke's expenses were only going to grow by about three percent. And this projection, from what I understand of it, is based upon some document that Mr. Dagen reviewed that he said was a St. Luke's document, but I'll submit to you that I have no idea what that document is. I have no idea who created it. We don't know why it was created, when it was created, whether it was official budgeting document, frankly, what the document even is.

And that's because in his analysis, Mr. Dagen never talked to anybody at St. Luke's about it. And in all those depositions and investigational hearing transcripts that Mr. Reilly told you he's submitting as part of this hearing, in not a single one of those did the Plaintiffs or the FTC ever ask any St. Luke's employee about this purported document.

And so it's -- in other words, these financial calculations and the prediction that Plaintiffs have and that their expert has that, you know, things were going to get better for St. Luke's, are based off of some document that their expert has never independently verified.

You know, it's significant, because when these assumptions don't really fit with reality -- and, Mike, if you can pull back slide two -- it's clear looking at this and looking at, you know, operating income and the losses, from

2007 through 2009, St. Luke's expenses rose faster than its revenue. And that was continuing in 2010.

So this notion to suggest that all of a sudden what's happened over the last three years -- and, you know, if you look back, the last five years, to suggest that this was going to change dramatically and things were going to be okay for St. Luke's, it -- it should have given Mr. Dagen pause.

You know, the evidence here belies the fact that St. Luke's would have achieved the dramatic turnaround that the Plaintiffs are arguing would happen here.

You know, if we can go to -- there we go.

Even Dan Wakeman himself admitted that although he was successful with many of these three-year goals, he was unable to meet very -- one very important goal, and that was financial performance.

No one here is saying that Mr. Wakeman didn't do a good job, but in the end, St. Luke's was unable to fix the real problem that it had, which was its inability to cover the cost of its inpatient care with its current commercial reimbursement rates, and it particularly couldn't fix that problem when the payors wouldn't negotiate with it.

You know, at the time of this joinder, St. Luke's faced a competitive market with weak demographics, declining volume trends, high unemployment, low median incomes and reimbursement rates that just didn't keep up with the cost of

providing inpatient care.

And as you'll see by his very own words, as Mr. Wakeman predicted, in the end, notwithstanding all other events, if St. Luke's had to stand alone in August of 2010, the hospital would have been out of business in three to four years.

So if you don't have any other questions, that's it.

THE COURT: Leave that up for a minute.

Thank you.

We'll take a 10-minute break now.

(A recess was taken from 3:13 p.m. to 3:25 p.m., after which the following proceedings were had:)

THE COURT: Thank you, ladies and gentlemen. Please be seated.

Go right ahead, Mr. Marx. I can hear you from here.

MR. MARX: I want to spend the next 40 or 45 minutes, if I can contain myself, talking about the nature and history of competition in the relevant markets that the Government has alleged, and the competitive effects of the joinder on those markets. And there are several reasons why the market shares and concentration levels on which the Government focuses are not enough to establish a likelihood that the Plaintiffs can prove that the joinder will violate Clayton Act, Section 7.

First, ProMedica and Mercy are each other's closest competitors in the Toledo market for general acute care

inpatient and OB services. And, as such, Mercy will constrain ProMedica's ability to exercise market power if it dared to try.

Second, St. Luke's simply isn't in the same competitive sphere as Mercy and ProMedica are. It does not offer any unique services. It doesn't have a unique location that make it a must-have for employers or payors. And if you look at the declarations that the Government provided and even some that we provided, you'll see they almost all describe Mercy or ProMedica as a must-have system. UTMC is a must-have system because of the high level tertiary and quaternary care, q-u-a-t-e-r-n-a-r-y, I think.

But St. Luke's is never described as a must-have system. It's not in the same competitive sphere as ProMedica and Mercy.

THE COURT: Well, true, but both Mercy and ProMedica have, or have had, or are in the process, I would guess, of seeking land for expansion in southwest Toledo, southwest Lucas County, because of their absence from that quadrant. And what impact will that have on the community, St. Luke's, and the remaining three competitors?

MR. MARX: You're exactly right. ProMedica has land at Arrowhead, Mercy has land, Strayer land, and of course, UTMC is located right there anyway. And they're expanding in various different ways, and they each have strategies for

addressing the southwestern portion of the marketplace to try and attract more patients from there.

And as Mercy and ProMedica expand their operations, expand the range of services and the way that they deliver services in the southwestern portion, they will continue to constrain each other. They're not going to be able to exercise market power. They're not going to be able to raise prices above competitive levels because they're right there competing against each other.

The effect on St. Luke's, however, would be that St. Luke's would find it harder -- even harder to compete than its found itself so far. And that is because it doesn't offer anything unique.

Is Maumee a desirable part of the marketplace? Absolutely. But let's be clear about this. While the Government wants you to focus on St. Luke's core service area where it draws 90 percent of its patients, the reality is that's just a part of the relevant market. And if they're going to define the relevant market as Lucas County, what they're essentially saying is from a patient's perspective, any of the hospitals in Lucas County are reasonably interchangeable with each other. So if a patient wants to go to St. Luke's but for some reason ProMedica attempts to raise St. Luke's rates above competitive levels, well, they can go to Mercy Hospital that's in Lucas County, they can go to UTMC.

They may prefer, patients may prefer to go to the closest hospital.

But let me just give you --

THE COURT: Unless they're driven by the payor.

MR. MARX: But payors can, and will, if they need to, incentivize patients to seek the lower-cost provider.

For example, we know, we know that -- what's the best way to put this without disclosing information I shouldn't be disclosing? We know that there is a parent of somebody who -- of a competitor in Toledo that actually does have as part of its health plan, tiering. So it encourages its members to go to hospitals that are lower cost by covering a higher percentage of their healthcare than if they go to, say, a second tier provider in the network.

We know that there's another payor, because the depositions last week disclosed it. I won't tell you who it is publicly, but I'll tell you who it is privately in the stuff we submit, that has a pilot program now that's intended to incentivize and steer. I don't like the use of that term, but that really is -- to steer patients to lower cost providers.

We know that even -- and I can't remember whether it's -- and this is a matter of public record so I'm not going to be disclosing anything confidential -- I don't remember if it's Anthem or MMO that has some feature on its website that

allows patients to check and see which of the providers in its network is lower cost. Now, is that a steering mechanism? Not yet, but it's the first step in trying to, I think, condition members to think more about the cost of the care that they're seeking.

And the problem here for St. Luke's, as the competitors respond, is that -- and that's what -- and that's what Mercy and ProMedica are doing as they expand their operations in southwest Ohio, the payors will have the ability to steer their members. And they're not going to need to steer them to St. Luke's because they can't -- they can get everything they want from somebody else. And that's really been the problem.

And payors are well equipped to defeat any attempt by ProMedica to exercise market power. We know, we know that payers have demonstrated the ability to market a network without one of the two multi-hospital systems. They've done it in the past, and there's no reason to believe that they couldn't do it in the future if ProMedica attempts to raise St. Luke's prices to anticompetitive levels.

And, again, while the Government downplays it, the fact that there is excess capacity in the market in place, and the fact that physicians in Toledo -- and this is a little bit different than you find in, I think, lots of other cities where I've been involved in investigations -- physicians in

Toledo are members of all the -- they practice at all the hospitals, and they actually practice at all the hospitals. They're credentialed there. Not all of them at all of them, but a lot of them at all of them.

And what that means is if a payor has a patient and that patient's physician probably has the ability to treat the patient at a Mercy hospital or at a ProMedica hospital or UTMC and maybe even St. Luke's, so if ProMedica tries to increase rates the payor can say, look, you don't have to change your physician, your physician can treat you at Mercy.

THE COURT: It's changing again, as it did 15, 16 years ago, because of the acquisition of practices and as part of those acquisitions saying you may only admit to this hospital.

MR. MARX: Fair point.

And, you know, we checked that, because we wanted to know whether or not with, for example, Mercy's employed physicians -- and as you know, they employ about a hundred, and they're acquiring more physician practices.

UTMC, of course, has its faculty practice plan, and it employs those physicians.

And, of course, ProMedica's physician group employs a couple of hundred private primary care and specialty physicians.

But we checked to see whether or not even those

employed physicians were credentialed and practiced at other hospitals, and frankly surprising to me, but true, they do. So ProMedica doesn't restrict its physicians from practicing at other hospitals. Indeed, many physicians from the ProMedica physicians group practiced at St. Luke's before this joinder, just like they admit some patients to Mercy. Same thing is true for some of the Mercy physicians. That's one of the unique characteristics about the Toledo market that make this market share and concentration analysis that the Government wants to rely on less -- an inadequate predictor of future competitive performance.

In other situations, other markets, I might say, well, that might be a factor. But separately, as well, of course, there are -- there remain lots of independent physicians who have privileges at multiple hospitals and will treat patients.

And one of the things that we see, there was a study -- in our post-trial findings, I'll get you the -- there's too many things for me to remember to give it to you precisely -- but there was a study as to why it is that patients select their hospitals. And the most important criteria was not the hospital I think is what this showed, it's the physician. And one of the beauties about this market is, the physicians practice in multiple hospitals.

So it's not a situation where ProMedica can say take

us or you don't get treated. You can take us, and if you take us you can get treated at our hospitals and now St. Luke's, and payors have the ability to say, no, you're trying to charge us too much, and their members' physicians will still be able to admit their patients someplace else.

THE COURT: Sorry to interrupt.

MR. MARX: No, that's okay. Anytime you have a question.

There's simply no evidence here -- oh, I started to talk about the excess capacity. The excess capacity is important because it demonstrates that if ProMedica and St. Luke's, after the joinder, can't reach an agreement with a payor, the excess capacity establishes that the payor~-- the other hospitals could pick up the slack and treat the patients from -- that otherwise ProMedica or St. Luke's would treat. The payor doesn't need to worry about where am I going to send my patients. There's plenty of excess capacity at Mercy and UTMC.

Using raw market share percentages to infer market power, Your Honor, simply overstates St. Luke's competitive significance. The reality is -- I don't like to say it this way, but it's true -- St. Luke's has been a bit player in a market where ProMedica and Mercy are the major players. This market has an overabundance of capacity, which, by the way, increases costs.

So you wonder why it is, why it is that costs may be, or appear to be higher in Toledo? It's because we have excess capacity. We're over-bedded there. And when you have more beds than you're filling, and you're staffing those beds, you have a cost that you're not recovering for because you're not treating patients. Or if you're treating the Medicare and Medicaid patients, you're not getting compensated for the cost.

And the simple truth is Toledo can't continue to support four independent hospitals and systems. It's just not big enough. ProMedica's commitment to continue to maintain and operate St. Luke's as a locally managed and controlled community hospital will benefit that market.

THE COURT: Are you getting your cost figures? Are you using cost figures from the published costs, or are you using what they're actually charging to those covered by an insurer who is part of a plan?

MR. MARX: We're looking at two elements. In terms of the development of the cost coverage ratio, we look at the direct and indirect costs of providing the care from our financial statements and those of St. Luke's. Plus, we look for a margin.

On the revenue side, we're looking at what we actually collect from the payors. That's the way that --

THE COURT: Fine; thank you.

MR. MARX: We've talked some about this. You're familiar with this. I'll try and click through this a little bit quicker. Again, you haven't heard as much about Mercy, you know a lot about Mercy, but I have to protect the record a little bit here. So Mercy, as you know, operates three hospitals in Toledo which are proximately located to the -- to ProMedica. You're familiar with the area, so you're more familiar with the area than me. We've got the Toledo hospital, of course, which is the flagship hospital, appears to be located a little bit more centrally up in the north.

A little bit north of there we have Flower Hospital. Of course, St. Anne Mercy is located approximately to Flower. St. Vincent Mercy Medical Center, Mercy's flagship hospital is located not far from the Toledo Hospital and then I guess east of the river we have St. Charles Mercy and Bay Park. St. Luke's, of course, is located in that green dot on the south.

Now, the Mercy and ProMedica hospitals offer similar services. They compete vigorously to attract patients to those services. The Toledo hospital and St. Vincent both provide sophisticated tertiary services, both have a trauma unit and a children's hospital on campus.

There's evidence, Your Honor, that Mercy is able to and poised to respond to ProMedica's expansion into the southwest, more directly into the southwest segment of Toledo.

And given the history of ProMedica's and Mercy's rivalry, it's not surprising, as you point out, that Mercy already owns land just 2 miles from St. Luke's at Strayer Road in at Monclova Township. And it is well positioned -- it's their words, not mine -- to move forward with its plans to expand its services in southwest Toledo.

Indeed, we know that Mercy has already received site plan approval to construct a new 73-bed hospital. It might not have plans to do that right now, but it doesn't need to build a new hospital to be able to compete effectively in the southwest. It simply needs to add a couple of primary care physicians for example.

I don't know if it's doing that or not, but I wouldn't be surprised if it was. If it adds a couple of employees, a couple more primary care physicians, then all of a sudden it's better able to compete with ProMedica and St. Luke's after the joinder than perhaps it was before.

Now, ProMedica and Mercy have been head-to-head competitors in every important dimension. And here, I will take the slide.

Each offers a full array of general acute care inpatient services, including the most advanced services. Not quite as advanced perhaps as UTMC, but more advanced than what St. Luke's offers.

Each offers general acute care services in three

separate but overlapping locations. Each has taken steps to reposition their services on a systemwide basis so as to deliver their services more efficiently and cost-effectively, as the demographics of the Toledo area have changed.

Let me provide an example, because it's something that St. Luke's can't do, Your Honor, on its own. Mercy eliminated high quality OB services at St. Anne's. It used to provide OB services at St. Anne's, and it eliminated them there because St. Anne's didn't attract enough patients to sustain a profitable OB service.

Instead, what Mercy did was consolidate its OB services at St. Charles and at St. Vincent. That's the kind of repositioning, reconfiguration of services that Mercy could do because it had three hospitals. And if it couldn't reach minimum efficient scale, as the economists like to call it, at St. Anne's delivering babies, then it could take that underutilized capacity, consolidate it at St. Charles and at St. Vincent and free up the beds at St. Anne's to provide a different service. That's what we call repositioning.

The problem for St. Luke's is, as Ms. Carletti told you, when the OB services line is losing money because it isn't delivering enough babies to be able to be profitable, or the cardiovascular surgery service line is unprofitable because they're not doing enough cases to be profitable, St. Luke's has only one option. They have to close the

service or continue to offer it unprofitably.

With ProMedica, they will have the opportunity to consolidate and achieve cost savings that it couldn't do by itself. And ProMedica engaged Navigant to analyze how ProMedica and St. Luke's can best combine their services in a manner that's cost effective and efficiently serves the community. That's what Navigant was brought in to do.

And one specific example that the FTC has already approved is the consolidation of inpatient rehab services at Flower Hospital. St. Luke's had underutilized impatient rehab -- we've talked about this a little bit. Rehab services, they weren't using all of it. Flower, unfortunately, had a similar situation.

By shifting the underutilized rehab beds from St. Luke's to Flower, ProMedica and St. Luke's are enhancing Flower's rehabilitation services, that's good for the community, and they're allowing St. Luke's to re-purpose the newly opened space to accommodate more medical surgical beds.

Directly in the market that for reasons that I don't quite understand, the FTC somehow thinks we're going to change.

The increase in med surge beds will allow St. Luke's to accept more patients that present to its emergency room and reduce a sometimes unfortunate and unfortunately high emergency room diversion rate. And as you know, if the beds

in the hospital are filled, then a hospital can't accept new patients into its emergency room because it has no place to put them when they leave the emergency room. That's what happens when you get diversion. St. Luke's has had that problem periodically.

Changes like that are not the kind of actions St. Luke's can do on its own. It doesn't have the other facilities to be able to generate those kinds of efficiencies. And that inability to reposition and realign its services is one of the reasons that St. Luke's considered eliminating unprofitable service lines, like OB, cardiac services, its diabetes center, cardiac and pulmonary rehab and tobacco treatment.

With ProMedica, St. Luke's can realign its services. That's one of the pro-competitive benefits that St. Luke's joinder with a local system as opposed to a Cleveland Clinic or somebody from Detroit might provide.

Now, the parties themselves, third parties, I'm sorry, recognize that ProMedica and Mercy are each other's primary competitors.

One of the payors during a deposition that the FTC took said, and I won't identify who it is, in response to the question:

In your view, are there particular hospitals that compete more closely with each other than with a broader range

of hospitals?

Answer: I think the ones I mentioned previously, the lineup between ProMedica and Mercy, and they're very competitive.

No surprise, no surprise. Take a look at how they line up.

Although, ProMedica and Mercy are the predominant competitors in Toledo, they face stiff competition -- we haven't heard much about these guys either -- from UTMC.

UTMC is an academic teaching hospital that offers almost the same primary and secondary care inpatient hospital services as Mercy and ProMedica and St. Luke's, with the one exception of OB services. UTMC, as we've said, is the only hospital to offer certain sophisticated quaternary services.

St. Luke's doesn't have anything unique to offer. It provides general acute inpatient care services with only limited tertiary offerings. I can show you an example of this with the next slide, the top 15. There we go.

Slide seven lists the top 15 diagnostic related groups for St. Luke's in order of the number of -- I think it's the number of commercial discharges.

So for OB, I think the number was, gosh, one a day would be about 366 or so commercial discharges.

And you can see as you work down that list of DRG groups, with the exception of newborns, where UTMC doesn't

offer the service and St. Anne doesn't anymore, every other hospital in the market that the Government has alleged, including Wood County, which I understand is in Wood County, but I leave up there only because it offers OB services, as well, every other hospital offers the same basic services. St. Luke's offers nothing unique.

In addition -- next slide, please.

The services that St. Luke's is offering, and this is a little messy to read but I'll try to explain it to you, are generally, as you would expect, not as complex as the services that are offered by the competing hospitals. And the way that you can tell this, although it is a little messy, is St. Luke's is always represented with respect to each of the DRGs listed on the -- DRG groupings listed on the left-hand side, it's the first of the four bars. And what this slide depicts is the level of complex -- average level of complexity of care delivered by the hospital with respect to that particular service line.

So if we look, for example, at, well, pick eye care as a better example, the nervous system for the point I want to make, you can see that St. Luke's hospital has the lowest of the level of acuity, average level of acuity for the four different systems in the market.

Same thing is true for ear, nose, mouth, and throat. Gosh, it's also true for respiratory system, true for

circulatory system, not quite true for digestive system.

And then there's another slide, as well, that I think shows a few more of these. And, again, for most of the services that are depicted, St. Luke's acuity of care, complexity of care is a little bit lower.

THE COURT: You do recognize that certain judges are red-green colorblind?

MR. MARX: That's why I wanted to tell you, Your Honor, that St. Luke's is the one on the top, and to the extent that its line doesn't extend that far to the right, it proves my point.

I live with someone who's colorblind, Your Honor, a little bit colorblind. You can imagine what it's like trying to pick out clothes.

St. Luke's, besides not offering patients a unique set of services, also doesn't offer patients a unique location that would make it a must-have provider. None of the hospital facilities in Toledo are more than a 25-minute drive from each other, and they're all pretty well connected by highways.

As a practical matter, St. Luke's location is not so important or distinct as to require its inclusion in a network.

And I can't help but point out if St. Luke's had something that was unique, if it was so important to payors in Toledo, then you would see its market share be higher. And,

frankly, I would think that you would have seen the rates that it was charging before higher, because it would have been more valuable than it was. You don't see that.

And if we look at -- if we look at -- and the Government likes to focus on this a lot, where it is that St. Luke's draws its patients from, it draws them from a very narrow area. Now, I know this doesn't look like a narrow area, but I'll explain to you how we get there in a minute.

This is most of Lucas County, but it's St. Luke's 90 percent service area. This is where it draws 90 percent of its patients. As a practical matter, I think if we focused it even more, you'd see that most of the patients are drawn from a core service area closer in around the hospital.

But if you compare where St. Luke's draws its patients from with, say, where -- what's the next one that you want to bring up -- oh, let's compare it to Mercy. We've overlaid Mercy's 90 percent service area on top of St. Luke's. So all of the red and purple -- well, I'll tell you, this right here -- well, you can't see that. That blue is the area that represents part of St. Luke's 90 percent service area from which -- it isn't part of Mercy's 90 percent service area. The point of this chart is to show you Mercy dwarfs -- Mercy's 90 percent service area dwarfs St. Luke's 90 percent service area. It draws from a much, much wider area.

I could show you the same things, but I'm not. I

could show you the same things for UTMC, and for ProMedica. But instead, I want to focus you on what I think is slide 17. No, it's not slide -- yeah, there we go, slide 17.

Let's back up to slide 16. Slide 16 shows the total discharges within St. Luke's 90 percent service area for the DRGs in which St. Luke's has three or more commercial discharges. This was in 2008.

And the point of this slide is to show you that within that 90 percent service area where St. Luke's draws 90 percent of its patients, it had 2573 commercially-insured admissions. But Mercy had, gosh, more than twice as many from that same area. And ProMedica had even more.

The point here is that Mercy is the smallest -- I'm sorry, St. Luke's is the smallest, even within the service -- the 90 percent service area from which it's drawing its patients.

Let me see if I can show you, as well, what this means in terms of patients' willingness to travel from St. Luke's primary service area to outside.

And if you look at this chart, the red on the left represents sort of the -- the map represents, is intended to depict the number of patients who travel, frankly, from west to east, who are willing to leave where St. Luke's is located to get care further away. And what we see generally for general acute care patients is -- and this is -- St. Luke's as

compared to Mercy, as it turns out, there were 802 discharges from July 2009 until March 2010 that, from Mercy on the east, of patients who came from the western part of this geographic market.

In contrast, St. Luke's only drew 238 patients to itself from the eastern part. So patients are willing to go from St. Luke's primary service area outside to where Mercy and ProMedica and UTMC have their hospitals.

So this travel issue is not -- it's just not a big deal. Patients will go where they need to go to get care.

THE COURT: But within the 90 percent area. A combined would be 68 to 32.

MR. MARX: Well, in this 90 percent area, the area that we're looking at represents the area from which St. Luke's draws 90 percent of its patients. This isn't really market share. This is -- so that's the . . .

Now, if we -- if we focus on the fact -- we turn now to the question of whether or not St. Luke's really is ProMedica's primary rival. We've talked some already about the fact that St. Luke's has a low volume of commercially-insured patients. Most of its discharges --

Next slide, I think.

Most of its patients -- keep going. No, back up. There you go.

Most of St. Luke's patients are government paid

patients. Sixty-three percent of St. Luke's inpatient discharges in 2007 were government pay, charity or other care. Only 36.4 percent of St. Luke's patients were commercially insured in 2007, 3700 patients, about 10 a day.

In 2008, the payor mix deteriorated a little bit for St. Luke's. The commercial pay, commercially insured patients dropped from 36.4 to 35.4. And this is a trend I don't think the Government's going to point you to.

In 2009, the payor mix deteriorated again for St. Luke's when its commercially insured patients dropped to 34.7 percent.

And that's important, obviously, because the Government pay patients have a lower cost coverage ratio than even the low cost coverage ratio that St. Luke's was getting for commercial pay patients, which means that it has -- that's what creates the -- that's what created the big long red bar that Ms. Carletti was showing.

Now, with respect to OB services -- let's flip a couple slides down then. There we go.

With respect to OB services, newborns delivered in 2009, St. Luke's had only 353 commercially-insured newborn deliveries. Again, less than one a day. Now, interestingly about this number -- let's go back one. We should have a total discharges, don't we? Do we have total newborn discharges back one, or no? Yes, we do.

This slide, Your Honor, represents St. Luke's total newborn discharges in 2009. It shows that they -- there were 527 babies born at St. Luke's altogether.

In order to be able to run a profitable OB program, newborns program, you need 700 to 800 deliveries. St. Luke's isn't anywhere near the minimum efficient scale required to have a profitable OB program. And, of course, of these 527 newborns, the next slide should show you -- I thought we had the 353. There you go. 353 were commercially insured.

Now, I know that the Plaintiffs are going to cite to you Mr. Wakeman's statements regarding the volume of OB patients at St. Luke's being so great that they didn't have enough rooms to provide services to its patients. You should be aware that in March 2010, there were more babies born at St. Luke's in any one month than had ever been born there before, as best we can tell, and have been born there since. So in March 2010 it's true, they were working at capacity for OB services for newborns.

Now, the other point that's important, however, is that St. Luke's is the only hospital in Toledo that has OB beds that are unstaffed. All of the other hospitals in Toledo that deliver newborns staff their -- that section of the hospital at a hundred percent of their licensed beds. St. Luke's didn't. So it actually -- had it staffed those beds at a hundred percent instead of what it was doing, it

would have had more capacity. It wouldn't have been bursting as much as . . .

Now, to suggest that the joinder will grant ProMedica newfound market power to demand anticompetitive rates ignores the realities of payor networks in Toledo. Payors have leverage to negotiate favorable rates. They have more leverage based on the size of their membership and thus the amount of dollars they pay to a particular hospital. That comes as no surprise. The bigger the payor, the better the rates it's going to be able to negotiate.

And we know from past experience that the payors have been able to market networks that didn't include all of the providers. Until 2008, that's the way it was. MMO contracted with Mercy, UTMC and St. Luke's, Anthem contracted with ProMedica and UTMC. And, of course, ProMedica Paramount contracted with ProMedica and UTMC, as well.

And all of these plans were successful. They all grew, they were able to market their health plans to employers successfully in the marketplace.

Interestingly enough, there were some plans that were open network that had all four providers. And you would think, you would think that if having open access was so important, plans like Aetna, for example, would have been much more successful than they've turned out to be. They had all the hospitals in their network. But for whatever reason, they

weren't able to increase their market share terribly much. Were they able to compete? Yes, but as a practical matter, I think their market share now may be what, about, what are we, nine or 10 percent? There should be a pie chart there someplace that will reflect that, and I will find it for you. Twenty-eight. Aetna's eight percent.

And for all this period of time, even when the others only had -- only had networks consisting of one of the two big systems, and UTMC, or and UTMC and St. Luke's, Aetna had them all. I think Frontpath may have had them all, too. And they weren't able to demonstrate -- St. Luke's certainly didn't add enough for them to increase their share to the level that MMO, Anthem and Paramount had attained with their narrower networks.

So the whole notion that it would be impossible for payors to market a narrower network today, well, I don't disagree with the notion that consumers prefer more choice. If the tradeoff is between choice or having to pay more, I think Paramount's success demonstrates that employers are willing to take a little bit less choice if that's the option.

Give me just a moment, Your Honor. I'm trying to see what I can skip that we've already covered. I keep stealing my colleague's time, and I'm cognizant of the 5:00 o'clock hard stop.

I want to point out something in particular as it

relates to something we talked about earlier, and that is the overlap of physicians. Again, distinguishing this marketplace, the overlap of physicians among the different health plans makes it easier for them to -- for the health plans to encourage patients to treat -- to get treatment at other hospitals in the event that ProMedica attempts to exercise market power by raising prices above competitive levels.

I think that we've got a slide that should show, I think -- oh, yeah, we do. Slide 36 for just a second.

The review that Ms. Guerin-Calvert, who, by the way, was the economic expert who testified in the Long Island Jewish case, so it's not like she doesn't have a history of accurately assessing competitive effects in hospital merger cases that courts have decided, when they looked at -- when Meg and her colleagues looked at the physician overlaps, what we did see was that physicians tend to practice at multiple hospitals. We wanted to look specifically at the issue for OB services, and that should be the next slide. And I guess we're not going to let everybody see that, but you can see that on your monitor, I think, and I can see it if I look at the page.

There are 19 OBs who admitted patients to St. Luke's during this time period, 2007 to 2009. Of the 19 obstetricians who admitted patients to St. Luke's, virtually

all of them admitted patients to Mercy. You can see that if you look at the distribution of numbers over the years. And 11 of them admitted more patients to Mercy than to St. Luke's.

I think somebody's going to correct me if I get this wrong. We've highlighted the two OBs who submitted declarations for the FTC; is that right? And you'll note that they tend not to admit patients to Mercy hospitals, but most of the others do.

Let me talk for a minute about contract. Plaintiffs have cited no evidence because no such evidence exists that ProMedica currently exercises any anticompetitive market power, nor do they have any evidence that ProMedica will operate any differently because of the joinder. ProMedica currently negotiates contracts with commercial payors using that benchmark that we've discussed known as the cost coverage rate.

Ron Wachsman's declaration, Ron Wachsman's declaration, which is going to be exhibit number TT -- you don't have to -- I'm just telling you for the record, it's in the notebooks. I'm not going to flash it up for you on the screen, but his affidavit describes in detail how it is that ProMedica negotiates contracts with payors. And they do this using this cost coverage ratio, where ProMedica attempts to negotiate rates that cover its direct and indirect costs and provide it with a small margin.

And Mr. Oostra testified that, you know, we'd like to get a 4 percent margin if we could do it. Frankly, I think the rating agencies would like for them to get a 4 percent margin, but they can't. They haven't been able to. They have been able to get somewhere a little bit north of three percent but they haven't been able to get to 4 percent.

And of course that's no different than what the other hospitals that are -- even the not-for profits that are profitable in Toledo do, that's what they strive to do. The affidavits from the competing hospitals, whether they're the ones in Toledo or the ones in -- oh, Wood County or Fulton County all say the same thing. When we negotiate with payors, first, we try to get the best price we possibly can. I don't know think the antitrust laws prohibit that. If they do, I haven't heard about it.

And, second, we try to negotiate a price that covers our costs and gives us a margin so that we can reinvest in our facility, so that we can make sure our balance sheet is strong so that we have access to capital.

In UTMC's case they have a strong academic mission that they need to try and fulfill. That costs money, and that's what that little extra margin is for.

So to the extent that ProMedica does that, it's not doing anything that anybody else is doing. St. Luke's would like to be able to do that, but so far that wasn't a benchmark

that it was able to reach. Without any hard evidence that ProMedica plans to exert any anticompetitive market power, Plaintiffs are relying instead on documents created by St. Luke's to insinuate that the only reason for the joinder is so that St. Luke's can extract higher rates from commercial payors.

They're not studying any documents that came from us for that.

And that's one of the things that makes this case distinguishable from the Evanston Northwestern Highland Park Hospital case. In that case, the documents contemporaneously prepared documents, prepared by the executives both for Evanston and for Highland Park made it clear before the -- for years before the transaction, they thought that merging would enable both of them to extract anticompetitive higher prices from payors. It was clear that that was their primary intent when they pursued the deal, and that was their intent for years, and it came from both parties' documents.

You don't see that in ProMedica's documents here, number one. Number two, in that case, of course, they had post-transaction evidence, because the FTC let the deal go through, they waited four or five years and then said, let's see what happened, and lo and behold, in that particular case the evidence demonstrated that Evanston Northwestern Healthcare Highland Park combined were able to extract higher

prices from payors after the deal and remarkably, never understand this, but remarkably, the CEOs of the two hospitals boasted about the fact that but for the transaction, they wouldn't have been able to do that.

So the evidence is radically different in that case than what we have here. In fact, the only post-joinder evidence that we have here so far was the contract that ProMedica negotiated with MMO. And while that contract -- for St. Luke's, just for St. Luke's. And while that contract does provide for rate increases during the course of the four-year contract, even at the end, the cost coverage ratio that's presently estimated will only -- will be less than the cost coverage ratio that derives from the amount that Paramount is paying St. Luke's as a in-network provider in the Paramount network now.

Your Honor, I think I've overstayed my welcome as I talk about competitive effects, and we have a couple of other topics to cover this afternoon. So I think I'm going to sit down and close with simply telling you that we think ProMedica's commitment to continue to maintain and operate St. Luke's as a locally managed and controlled community hospital in the end will put the community, the Toledo community, in a better position than it would have been absent the joinder.

And with that, I'll let Mr. Wu explain to you why it

is that the parties pursued this transaction.

MR. WU: Your Honor, a natural question after hearing Plaintiff's argument, is what were St. Luke's and ProMedica's true motivations for entering into their joinder agreement. I will address that question and the process that St. Luke's went through to search for an affiliation partner and why St. Luke's and ProMedica chose to proceed with their joinder.

For St. Luke's, the main motivation for seeking an affiliation was that its senior management and its board concluded that it could no longer continue as a full-service stand-alone independent community hospital.

Now, this morning you heard a lot about St. Luke's CEO, Dan Wakeman's three-year turnaround plan and how it resulted in increased volumes and increased revenue. Now, that's all true. But as my colleague, Ms. Carletti, described, those turnarounds failed to preserve St. Luke's ability to continue as a stand-alone independent community hospital.

Indeed, St. Luke's senior management recognized that its efforts to gain revenue through volume weren't working because they simply weren't enough to overcome its poor financial condition. In addition, St. Luke's had to devise a strategy for reacting to and complying with the passage of the landmark healthcare reform law, which mandates or effectively requires several costly initiatives on the part of hospitals,

including investments in IT infrastructure, the ability to accept risk for patients, the ability to accept bundled payments from Medicare as it was coordinating care among different types of providers in the community.

Therefore, St. Luke's found itself at a crossroads, and for a fiercely independent hospital, there were no perfect options, and St. Luke's management thus reported that going it alone would be extremely challenging and weighed whether to give up St. Luke's cherished independence.

As it began evaluating potential affiliation partners, St. Luke's examined several factors, not just increased reimbursement rates, as Plaintiffs would have you believe. The factors that St. Luke's board considered when it ultimately approved a joinder included, for example, cultural compatibility, access to capital, the ability to better manage expenses, as well as, of course, the ability to respond to a reformed healthcare marketplace.

St. Luke's CEO, Dan Wakeman, the FTC's proclaimed turnaround expert, states in paragraph 7 of his supplemental declaration exactly what St. Luke's was seeking from an affiliation.

(Video played as follows:)

"St. Luke's poor financial condition in the years prior to the joinder with PHS was a motivating factor for St. Luke's consideration of the joinder, as well as its

consideration of other possible affiliations. St. Luke's financial condition required it to affiliate with a system that could provide it with an infusion of capital and a stable financial structure for future investment in St. Luke's physical plant and clinical operations to meet the requirements of healthcare reform.

"St. Luke's hope that any affiliation with another hospital system would allow it to cover more of its direct and indirect costs of providing care, including making up for the cost of shortfalls in Medicare and Medicaid reimbursement, charity care and bad debt, through above-cost reimbursement rates from commercial payors. St. Luke's also hoped that any affiliation with other hospital systems would result in reimbursement rates from its commercial payors that would allow St. Luke's to earn a positive margin to reinvest in its facilities and services."

(Video concluded.)

Therefore, in late 2009 -- late 2008, excuse me, and early 2009, St. Luke's began its search for a potential affiliation partner by contacting a number of hospital systems located outside of Toledo. These comprised namely of the Cleveland Clinic, the University of Michigan Health System, and McClaren Health. However, none of these hospital systems were interested in a potential affiliation with St. Luke's.

As to the Cleveland Clinic, it demanded that

St. Luke's first pay the Cleveland Clinic about $300,000 to conduct preliminary due diligence of St. Luke's.

Given St. Luke's current financial condition at the time, it declined the Cleveland Clinic's invitation to spend more money to disclose exactly what St. Luke's already knew about its poor financial condition and its operational challenges.

Now, St. Luke's also contacted the University of Michigan health system in nearby Ann Arbor. However, the University of Michigan health system neither wanted to disrupt its patient referral patterns from northwest Ohio nor provide St. Luke's with a significant influx of capital that it recognized St. Luke's required.

Finally, St. Luke's also reached out to McClaren Health, which it -- also based in Michigan, which had grown in the past through a series of acquisitions. However, McClaren told St. Luke's that its location in the southwest Toledo area did not fit within McClaren's strategic geographic plan.

With no partners outside of Toledo, St. Luke's then considered the other Toledo area hospitals as potential partners.

As Mr. Marx alluded to earlier, St. Luke's first considered an affiliation with the University of Toledo Medical Center. Despite beginning talks with the UTMC first out of the local systems and even signing a Memorandum of

Understanding with the UTMC in April of 2009, St. Luke's and UTMC never got to the point of conducting due diligence or discussing what the structure of any potential affiliation would look like.

In any event, an affiliation with UTMC raised serious and numerous concerns with St. Luke's senior management and its board. For example, St. Luke's was very concerned about how UTMC's academic culture, which focuses on teaching residents and research, would mesh with St. Luke's culture, which focused exclusively on providing quality patient care, as stated by St. Luke's board chairman, Jamie Black, in paragraph 17 of his declaration.

St. Luke's was also concerned about the UTMC's apparent tin ear for employee relations, as shown by awarding bonuses to senior leadership at a time when it was laying off employees. St. Luke's was also concerned about UTMC's unionized workforce.

CEO Dan Wakeman summarized his concerns about UTMC to members of the St. Luke's board in writing.

The superior/inferior attitude was fueled by their academic base and the perceived poor management practices by St. Luke's, as verified by our operational losses. Comments such as our pension shortfall being a deal breaker even before we start, or that our HR benefit management could benefit from their expertise. General comments from UTMC staff and board

members that once they take over St. Luke's, it will be run like a real business.

Now, more fundamentally, St. Luke's leadership was concerned about UTMC's lower quality and much higher cost of providing care, particularly in light of healthcare reform. St. Luke's CEO Dan Wakeman summarized these concerns about a potential affiliation with UTMC in paragraph 32 of his declaration.

(Video played as follows:)

"St. Luke's senior management and its board were concerned about -- concerned that UTMC as a state entity was bureaucratic and would not have the flexibility financially to affiliate with St. Luke's. St. Luke's was also concerned about UTMC's higher costs of providing care, its lower quality scores and it's unionized workforce."

(Video concluded.)

Besides the UTMC, St. Luke's also explored a potential joint venture or a full-blown merger with Mercy Health Partners.

Specifically, St. Luke's and Mercy explored service line joint ventures that would have covered cardiac services and women's and children's services. These would essentially consist of consolidating cardiac services at Mercy and women's and children's services at St. Luke's.

Now, the FTC has argued that instead of a joinder

with ProMedica, St. Luke's could have pursued joint ventures with another partner and obtained much of the same benefits it's going to accrue from a ProMedica joinder. However, and as you'll see on your monitor, St. Luke's and Mercy, with the aid of a consultant, Healthcare Futures, concluded that these joint ventures simply weren't feasible.

Having determined that a joint venture or series of joint ventures wouldn't be feasible, St. Luke's then approached Mercy about the possibility of a full-blown merger. However, Mercy recognized the problems that an affiliation with St. Luke's would pose. Indeed, Mercy enumerated the same issues, operational, capital, reimbursement, that St. Luke's had itself identified as serious problems, as shown on points one, two and three of the slide that's on your monitor.

Tellingly, Mercy came to the same conclusion that St. Luke's had. Namely, that it had a major commercial reimbursement issue. Mercy ultimately concluded that a merger with St. Luke's was not to its advantage, and it would be better served simply competing with a combined ProMedica and St. Luke's.

In fact, Mercy made its views known through a news letter in which it stated: We believe that a partnership or merger with St. Luke's would ultimately encumber our own strategic advances, and, rather, it is to our advantage to invest our capital, management expertise and time in our own

southwest strategy.

Now, even as St. Luke's was thinking about giving up its independence, it was still trying to preserve some measure of autonomy and local control. Not surprising, given its history of fierce independence. However, St. Luke's senior management and its board were both concerned that a merger with Mercy, part of Catholic Healthcare Partners, which as you know is headquartered in Cincinnati, would result in a loss of local control and governance.

At the same time that the board and the senior management were considering a merger with Mercy, St. Luke's medical staff made it known that it would oppose any merger with Mercy because of its poor relations with staff physicians, further complicating the actual implementation of how any merger with Mercy would work, as shown in paragraph 33 of Mr. Wakeman's declaration.

Given these alternatives, St. Luke's then decided to respond to ProMedica's overtures. The two had initially discussed potential service language, very similar to what Mercy and St. Luke's had discussed. Not surprisingly, the two also concluded that only a full merger might work -- a full joinder might work. And, in fact, that's what they did. They concluded that a full joinder would best address both parties' needs, St. Luke's on the one hand, ProMedica's on the other, as well as that of the communities they serve.

For example, in an e-mail to St. Luke's CEO, Dan Wakeman on August the 4th of 2009, the chairman of the board for St. Luke's parent entity, Ohio Care Health System, William Aman (phonetic) wrote: We've not talked much about the ProMedica option, but when personalities are put aside, it may be the easiest option to accomplish with the greatest community benefit without having to totally sacrifice our independence and identity.

Accordingly, St. Luke's entered into the joinder agreement for a number of reasons, as St. Luke's CEO Dan Wakeman states in paragraph 35 of his declaration.

(Video played as follows:)

"St. Luke's entered into the joinder agreement with PHS for several reasons. First, St. Luke's poor financial performance, despite treating more patients over time, threatened its viability as a stand-alone community hospital.

"Second, St. Luke's needed capital to invest in the infrastructure, fund its pension obligations and increase employee compensation, all of which St. Luke's had deferred because of the lack of operating funds.

"Third, St. Luke's needed to align itself with other local healthcare systems to prepare for changes in healthcare delivery that healthcare reform will accelerate."

(Video stopped.)

Now, that was St. Luke's perspective.

ProMedica, on the other hand, initially shared many of the same concerns identified by St. Luke's itself and by Mercy. As ProMedica's CEO, Randy Oostra stated in paragraph 17 of his declaration.

(Video played as follows:)

"PHS had concerns about the potential joinder with St. Luke's. PHS's concerns included the fact that St. Luke's financial condition was weak and deteriorating. St. Luke's was in default on its bond obligations, it had an unfunded pension obligation of about $45 million, it had deferred capital expenditures on its physical plant for many years, had not made the necessary investment in IT infrastructure to begin to adopt the electronical (sic) medical records programs it would need under healthcare reform.

"PHS's board was concerned that St. Luke's financial condition might have a negative impact on PHS's own financial condition going forward."

(Video stoped.)

Nevertheless, after thorough due diligence, ProMedica concluded that a joinder between it and St. Luke's would benefit each other and the community, as Mr. Oostra explains.

(Video played as follows:)

"PHS's board concluded that the joinder with St. Luke's was in the best interest of both hospitals and of the communities they serve.

"Both PHS and St. Luke's have a strong commitment to serving their local communities. By adding St. Luke's to its system, PHS believed that it could achieve operating efficiencies and that it could avoid the capital costs of constructing a new hospital facility on land, known as the Arrowhead property, in the southwest portion of Toledo, where PHS had planned to build a new facility."

(Video stopped.)

Now, ProMedica had also concluded that a joinder with St. Luke's would allow it to right-size the services and overcapacity within its system in a way that will not impact patient care, expand the geographic reach of its system and improve quality by sharing best practices.

Importantly, and I can't emphasize this enough, ProMedica did not enter into or ever consider that the St. Luke's joinder would allow it to raise reimbursement rates from commercial payors above the competitive level. Indeed, the Plaintiffs can point to no ProMedica document out of the 4 million pages it produced in response to the FTC's investigation that states ProMedica, as a result of this joinder, will gain the ability to raise either St. Luke's rates or its own above the competitive level.

To summarize, the St. Luke's and ProMedica joinder enables both parties to meet their critical objectives. For St. Luke's, it maintains an independent board, it gives it

access to the capital that it was denied, it will allow it to achieve cost savings, it will provide the potential to stabilize the financial condition of the system, which I think no one will dispute. And last, but not least, it will provide the ability for St. Luke's, as a formerly independent stand-alone community hospital, to be able to meet the requirements of healthcare reform.

For ProMedica, a joinder with St. Luke's will allow it to improve the geographic access to its system, it will enable ProMedica to realign the services within its system to better meet the community's needs; and, lastly, it will enable -- it will allow it to increase clinical best practices by sharing those best practices between it and St. Luke's.

THE COURT: I guess another one also, it would eliminate the need to build the Arrowhead facility.

MR. WU: That's exactly right, and that's a significant cost avoidance savings for the system.

Now, as a result of their negotiations, ProMedica is contractually obligated to operate St. Luke's as a fully operational community hospital for the next decade, while preserving core services, including obstetrics, St. Luke's independent board, St. Luke's medical staff and even the St. Luke's name and logo. Again, ProMedica is obligated to do this for the next decade, long after the FTC proceeding and any appeals are exhausted.

Moreover, ProMedica cannot change these obligations without the consent of St. Luke's independent board of trustees, who have a fiduciary duty to their hospital, not ProMedica.

Now, I want to point you to -- I don't have a slide, but Article 16.3 explicitly lays out and recognizes the right of St. Luke's board to enforce these commitments that ProMedica had made, and that can be found at PX58.

THE COURT: What's the role of the parent of St. Luke's? What is it intended to be after the joinder?

MR. WU: By parent, I take your question to refer to the St. Luke's board?

THE COURT: No, Ohio --

MR. WU: As a result of the joinder, Ohio Care, I believe --

THE COURT: Disappears?

MR. WU: No longer exists.

THE COURT: Thank you.

MR. WU: Now, in addition to preserving St. Luke's, the joinder will create significant pro-competitive benefits that Mr. Marx will now address, unless you have any further questions.

THE COURT: Thank you, no.

MR. MARX: Almost there, Your Honor, for today, anyway.

I want to spend a few minutes talking about the pro-competitive benefits of the transaction that Mr. Wu just alluded to.

I want to direct your attention, as well, because I'm not going to go into great detail about it, but Gary Akenberger's affidavit, which is exhibit BBB, contains a lot of the details surrounding what it is that I'm going to try and summarize in sort of a high level fashion before we finish for today.

The Plaintiff's proposed preliminary injunction, and I'll have a lot more to say about this tomorrow, threatens to reverse the pro-competitive benefits that the parties, and by extension the community, have already recognized, as well as the benefits that are yet to come. The joinder's already benefited St. Luke's and its patients by financially stabilizing the flailing hospital and preventing some of the drastic measures that St. Luke's was going to have to implement to remain financially viable.

And there I'm referring to significantly cutting services and personnel, which reminds me about something that I forgot to mention earlier today. You may remember that slide that Mr. Reilly put up that alluded to how much of a decrease in St. Luke's market share there would have to be to irradicate this presumption of illegality that the market shares in the -- remember that slide up and then down.

And he said, and I think I got this right, that there were no documents that you would find that suggested at all that as a result of this transaction, St. Luke's share would drop to the levels that would eliminate the presumption.

And my colleagues reminded me that there was a document -- there were documents that discussed that as it relates at least to OB services, because you'll recall, or I know we've cited, and I'll have them for you if I need to tomorrow, there were documents that St. Luke's created that said our financial situation's really bad. We need to consider cutting -- I think Ms. Carletti talked about this -- we need to consider cutting OB services, we need to consider cutting cardiovascular surgery, and then a whole host of other services that frankly aren't general acute inpatient care services.

And the significance of that document is that if that's what St. Luke's had done, its market share and OB services would have dropped to zero percent. It wouldn't have been in that market segment anymore.

So it's not an issue of whether or not there are documents that show it would have dropped to 1.2 percent or 1.8 percent, it would have been gone.

So to suggest there are no documents that contemplated that possibility, that's not right. There were documents that contemplated.

And one of the pro-competitive benefits that resulted from this transaction, from this joinder, is the fact that that wasn't necessary anymore.

In addition, the joinder infused St. Luke's with additional capital to pursue much needed capital upgrades, including federally-mandated IT upgrades.

The joinder -- the FTC poo-poos this stuff, but it's not insignificant, and Gary Akenberger's affidavit talks about it. The joinder also permits the parties to achieve significant savings by taking advantage of scale, economies and infrastructure and services that the hospitals cannot implement alone.

The parties estimate that they will achieve approximately 27 to $30 million in savings annually and 125 to $150 million in capital avoidance savings. And you recognized one of the big capital avoidance savings was the elimination of the need to built a new facility at Arrowhead, and that's one of the two big ones. But the other big one we shouldn't lose sight of is the avoidance of the need to build the new patient tower at Flower. And the reason for that is, Flower's got mostly semi-private rooms. It's not the industry norm.

If, if ProMedica's joinder with St. Luke's doesn't go forward, then ProMedica contemplated that it would have to build a new patient tower at Flower that would have private rooms, at a cost of -- I can't remember if that was -- give me

a second and I'll get you the number.

It was a lot of money.

And that cost will be avoided, too. And what that means is the funds that ProMedica won't have to spend duplicating resources that are already there and under-utilized, can be used for other purposes to benefit the community.

Now, entry of the Plaintiff's requested preliminary injunction threatens to irradicate all of those benefits. And I would point out to the extent that that preliminary injunction that the Government has imposed is entered by the Court, it seriously diminishes, decreases ProMedica's ability to and incentive to invest the $30 million of capital that the joinder agreement requires ProMedica to invest over the course of the next three years.

It's interesting, the Government sort of wants it both ways. It doesn't want ProMedica to be involved at all in St. Luke's operations. Doesn't want the joinder agreement to go forward at all, but it does want to force ProMedica to make St. Luke's better than it was the day before the joinder occurred.

And quite frankly, Your Honor, we will discuss this at more length tomorrow. They can't have it both ways. If -- if a preliminary injunction is entered here, and we don't think you should, but if you do enter one, you can't enter one

that the law doesn't allow you to enter one that requires us to make St. Luke's better than it was the day that we got it.

The most you can do, I think, if you do anything, would be to say you can't make it worse than it was when you got it. But you can't impose an affirmative obligation to us to say, you got to invest $30 million that, frankly, you know, we had no obligation to invest prior to the time of the joinder. That's a big difference. We'll talk about that tomorrow.

Now, the joinder has significantly benefited St. Luke's and its patients by immediately securing the financial viability of the hospital. Ms. Carletti explained that prior to the joinder, St. Luke's had a financial problem. This chart identifies it.

Its bond rating had been downgraded, it was in technical default on its bond obligations, it didn't have the capital that it needed to maintain its infrastructure and prepare for the evolution of healthcare reform, and, of course, there was that lingering $45 million under-funding of its pension obligation.

When it joined with ProMedica on September 1st, those problems were immediately alleviated. Pursuant to the terms of the joinder agreement, St. Luke's has become part of ProMedica's financially obligated group, which means that ProMedica has assumed responsibilities for -- assumed

responsibility for St. Luke's liabilities, including those bonds that it was in technical default on, and its unfunded pension liability.

ProMedica negotiated with Ambac to cure that pesky bond default status, bond covenant violation status. And immediately -- well, within the time it was required, ProMedica contributed $5 million to St. Luke's foundation and, of course, is committed to contribute another $30 million over three years to fund capital improvements that St. Luke's had deferred because it didn't have the capital to make the investments.

So St. Luke's bond rating moved up. Where did it move to? I think it was better than it was in 2008, before, before -- there we go. It was better than it was in 2008 before Moody's made the first reduction of St. Luke's bond rating from whatever -- I guess it was A1 down to A2, and then they bumped it down to Baa2 in February 2010, and after the joinder with us, St. Luke's now has a bond rating of Aa3, which means its cost of capital to the extent that it needs it is even lower.

Now, as you know, the joinder alleviated St. Luke's doomsday plans of cutting services or personnel, but St. Luke's only, only rejected those possibilities because it chose, instead, to affiliate with another entity that could and would maintain St. Luke's as a full-service community

hospital going forward.

And you can take that slide off. We can go to the 13, I think.

Mr. Wu showed you this a minute ago. Section 7.1 of the joinder agreement is very important. It obligates ProMedica to maintain St. Luke's using its current name and identity and its current location for a minimum of 10 years after the closing date as a fully operational acute care hospital providing the services listed.

Section 13.2 prohibits ProMedica from taking any action that would cause St. Luke's to cease to operate as a general acute care hospital.

No other hospital merger case exists that I know of where the hospital, acquiring hospital, has made a similar commitment to this one. The community benefit commitment that the Butterworth case talks about, it's not the same thing. This is a commitment between the two parties that negotiated, hotly negotiated, frankly, the transaction to maintain the hospital as a fully operational general acute inpatient care services hospital.

Now, the community benefits and Dr. Peron's declaration, the exhibit number to which I should know, but don't -- discusses this, and Dr. Peron said -- ah -- OOO, actually, is the exhibit number. He says, I believe that if St. Luke's continues to put off needed investments in its

physical plant -- and he, by the way, is the chairman of the division of urology at St. Luke's and a former member of St. Luke's medical executive committee -- he believes that if St. Luke's continues to put off needed investments in its physical plant, which is much older than average, on average than the rest of the hospitals in the Toledo area, and in its services, it might not continue to provide the same quality of care that its patients have come to expect.

And, in fact, we'll see when we talk more in detail tomorrow about this particular issue, unfortunately, unfortunately, what we have found was because of St. Luke's financial situation and Mr. Oostra testified about this in his deposition last week, indeed, the indicators are that St. Luke's quality of care has diminished some during the tail end of 2009 and into 2010 before the time that it joined with us.

So the financial situation that existed there was beginning to have, it appears to us, based on the quality data that's being reported, to have had an impact, unfortunately, at St. Luke's. That's something we intend to turn around if you'll let us, but if not, I think it presages what's likely to happen if this injunction is entered the way that the Government wants you to.

Now, ProMedica's already committed $5 million in capital to the foundation, it's committed another $30 million, and you might say, well, what for? Well, Section 6.1 of the

joinder agreement -- shall commit a minimum -- a minimum of $30 million to St. Luke's over the three-year period following the closing date.

What is St. Luke's likely to use that $30 million for? Exhibit 6.1 talks -- now, we'll go there -- about that. These are capital projects that are to occur at the St. Luke's main campus. And there are several of them. Update their information technology systems, construct -- do some construction on an outpatient lobby, conversion of all existing patient rooms in St. Luke's to updated private rooms. Again, right now, St. Luke's has semi-private rooms. Not the industry norm. Renovate the heart center, and so on.

These were all items that were negotiated and agreed by the parties that that $30 million, the minimum of $30 million, would be used to fund, all projects that St. Luke's couldn't do on its own.

And as Ms. Lori Johnson's affidavit says, the information technology investment is particularly important, because the healthcare reform law requires hospitals to invest in an electronic health record and other systems, like disease registries and computerized physician order entry systems, and then integrate those systems with its existing core IT applications and similar systems located in physicians' offices.

This is the whole notion of what we refer to as

clinical integration.

These IT upgrades will benefit patients by enabling healthcare providers to comply with evidence-based best practices, and if the hospitals fail to achieve the meaningful use requirements by 2015, they're going to face cuts in Medicare reimbursement.

Prior to the joinder with ProMedica, St. Luke's couldn't have afforded those IT upgrades.

There are other efficiencies that have resulted already and that will continue to result because of and only because of the transaction. These are the kinds of things that Gary Akenberger talks about in his declaration. I'll just highlight a couple. ProMedica's added St. Luke's to ProMedica's medical malpractice insurance policy. That saves St. Luke's about $600,000 over a 12-month period. And while the ongoing savings may be only $273,000 per year, St. Luke's couldn't have done this by itself. It's because St. Luke's is able -- we're able to spread the risk over an additional hospital. St. Luke's couldn't do that by itself.

You know, $594,000 might not seem like a lot. $273,000 might not seem like a lot, but if you're losing 15.9 million every year, it's not unimportant.

St. Luke's saved another 50,000 when ProMedica added it to its neonatal services contract.

Gary Akenberger's affidavit talks about a whole host

of cost savings that integration teams from ProMedica and St. Luke's have worked together since the joinder occurred.

No question, a lot of this integration work did not take place before the parties decided to enter into the joinder transaction back in, gosh, it seems like just yesterday, but it was May 2010. But what the parties did was say, are there opportunities there that we think we might be able to achieve, and they identified them. Did they run them all to ground? Did they do the kind of efficiency study that the FTC would credit? And, frankly, to be honest with you, I'm not sure they would ever credit an efficiency study that hospitals did because their standards are just impossible to meet.

But that doesn't mean that there aren't good business case efficiencies and cost-saving opportunities there.

Since the joinder occurred, Gary Akenberger and a group of others from both hospitals have been working together to say where can we save money, big and small. That's what Gary's affidavit is all about, and that's where he comes up with the numbers that are reflected or will be reflected in a minute.

Yeah, that's one of them.

Those service line opportunities and integration opportunities, I think a big chunk of that, frankly, Your Honor, is the contemplated consolidation of the open heart

surgery program at St. Luke's with the Toledo Hospital. That program's just bleeding money as a practical matter, and St. Luke's doesn't do enough of those cases to be able to support it.

But in any event, Gary and his people have come up with, as indicated in the affidavit, about $19 million-worth of cost savings.

Included among those, I think as well are some back room kinds of things. You know, better prices for supplies that St. Luke's will be able to get when it purchases through the volumes that ProMedica can achieve, a whole host of, for lack of a better term, back room cost savings that St. Luke's couldn't get by itself, but once it integrates with ProMedica, it can.

Reduced cost for physician coverage. St. Luke's couldn't do it by itself. For whatever reason, ProMedica has a better deal with physicians to provide -- to provide coverage during odd hours.

And then, of course, there are these capital cost avoidances. Ah, here we go. Flower was 25 to 30 million in capital cost, with operating costs avoided of about 1.6 to $2 million on an annual basis. Of course, that 60-bed hospital at Arrowhead would have been 90 to a hundred million dollars that they can save.

The implementation of electronic medical records at

St. Luke's, this is a big deal, would save six to $10 million and another about a million dollars-worth of ongoing savings.

That's where the real efficiencies are. Those are benefits that we think benefit not only the parties that they couldn't achieve by themselves, but will also ultimately benefit the community.

As I've said, entry of the preliminary injunction will eliminate all of these benefits, has the potential to eliminate all of them. ProMedica would have a diminished incentive to continue its investment in St. Luke's if the Court grants the preliminary injunction the Plaintiffs seek. And ProMedica's integration teams, Gary Akenberger's teams, would lose the momentum towards integration -- integration, consistent, by the way, with the joinder agreement that they've already generated.

For all of these reasons, all the reasons that we've been discussing this afternoon, in the absence of the joinder, St. Luke's future competitive viability, and that's really what this relates to, would be as perilous as it was before the consummation of the joinder last September.

Absent the joinder, St. Luke's would revert back to its pre-joinder financial state, facing mounting debt obligations, likely reverting to its barely above junk status credit rating, which would jeopardize its ability to borrow additional cash and increase its cost of doing it, and lacking

the capital it needs to make the deferred capital improvements required to prepare for and comply with the requirements of healthcare reform.

That would be, that would be St. Luke's state if you entered the preliminary injunction that the Government requests. And because we don't want to turn back the clock that way, and because we don't think the Government has satisfied its burden of showing that it can ultimately succeed on the merits of this case, or that the injunction would be in the public interest, we respectfully request that you deny their request.

That's it for us for today. We'll be back tomorrow, I think after Mr. Reilly and the FTC spend an hour talking about what we've been talking about. We'll talk for an hour and a half about, I think, probably a little bit more focused response to some of the points that Mr. Reilly made this morning, and, of course, whatever else he throws at us tomorrow morning, to the extent that I'm able enough to respond to them, and we'll also talk about, specifically about the terms of this preliminary injunction that they've proposed and why it -- it's the wrong thing for the Court to do.

THE COURT: Thank you all very much.

MR. MARX: Thank you, Your Honor.

THE COURT: See you tomorrow morning at 9:00.

(The evening recess was taken at 4:54 p.m. Court to

reconvene on Friday, February 11, 2011, at 9:00 a.m.)

* * * * *

CERTIFICATE

I, Stephen W. Franklin, Registered Merit Reporter, and Certified Realtime Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 10th day of FEBRUARY, 2011.

/s/Stephen W. Franklin
_____
Stephen W. Franklin, RMR, CRR